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In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1560

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES GYPSUM COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, *infra*, pp. 1a-70a) is reported at 550 F.2d 115. The opinion of the district court (App. D, *infra*, pp. 75a-94a) is reported at 383 F. Supp. 462.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 71a-72a) was entered on January 6, 1977.

A timely petition for rehearing was denied on March 10, 1977 (App. C, *infra*, pp. 73a-74a). On March 29, 1977, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including May 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether competitors charged with what would otherwise be an unlawful exchange of price information may defend by arguing that the exchange might help them to establish a "meeting competition" defense to a charge of price discrimination.

2. Whether the district court adequately instructed the jury concerning the rules for establishing each defendant's involvement in the conspiracy, and concerning the conduct required to withdraw from a conspiracy.

3. Whether the district court coerced the jury into reaching a verdict.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal • • • .

Section 2 of the Robinson-Patman Act, 49 Stat. 1526, as amended, 15 U.S.C. 13, provides in relevant part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, • • • where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them • • •.
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services of facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the [Federal Trade] Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.
>
> • • • • •

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

STATEMENT

Since World War II gypsum board has replaced gypsum plaster as the primary material for internal walls of all types of buildings (App. A, *infra*, p. 3a). Sales of gypsum board between 1960 and 1973 exceeded $4.8 billion (App. 1955a-1956a).[1] The gypsum board manufacturing industry is highly concentrated; the four corporate respondents alone account for 75 percent of national sales, and the eight largest producers accounted for more than 94 percent of national sales from 1960 to 1973 (App. A, *infra*, p. 3a; App. 1956a). Demand for gypsum board is determined primarily by the level of demand for new buildings; because there is little difference among brands of board, one brand is selected over another on the basis of differences in price and credit terms (App. A, *infra*, pp. 3a-4a).

The indictment returned in the United States District Court for the Western District of Pennsylvania charged that respondents[2] and nine other defend-

[1] "App." refers to the Appendix in the court of appeals.

[2] United States Gypsum Company (USG) and Andrew J. Watt, its executive vice-president; National Gypsum Company, Colon Brown, its chairman of the board, and Jay P. Nicely, then its vice-president of sales; the Georgia-Pacific Corporation; and the Celotex Corporation.

ants[3] conspired: (1) to raise, fix, maintain and stabilize the prices of gypsum board, (2) to fix, maintain, and stabilize the terms and conditions of sale of gypsum board, and (3) to adopt and maintain uniform methods of packaging and handling gypsum board. The indictment alleged that one of the many devices respondents employed to carry out the conspiracy was an exchange of price information. Under this practice—which respondents conceded to exist—an official of one company would "verify" a competitor's pending price offers by telephoning an official of the competing company (App. A, *infra*, p. 12a).

The district court denied a pretrial motion to dismiss the indictment because of pre-accusation delay (App. D, *infra*, pp. 75a-94a). At trial the prosecution offered proof that respondents had used numerous methods to fix and maintain prices and terms of sale. It also offered evidence tending to show that respondents' price information exchanges resulted in the stabilization of prices.[4]

[3] Graham J. Morgan, chairman of the board of USG; William H. Hunt, president of Georgia-Pacific; William G. Herbert, president of Celotex; Kaiser Gypsum Company, Claude E. Harper, its president, and Robert A. Costa, its vice-president; The Flintkote Company, George J. Pecaro, its chairman of the board, and James D. Moran, its president. These defendants pleaded *nolo contendere* (App. A, *infra*, pp. 3a-4a and n. 3).

[4] Although the industry experienced overcapacity that normally would have dictated a downward price trend (App. 999ex-1000ex; 67ex), prices rose in December 1965 and remained stable through 1967 (App. 1331a, 1317ex, 1299ex, 1305ex, 1359ex-1360ex, 1328ex, 1374ex, 879ex, 1329ex). Offi-

Respondents denied that they had agreed to fix prices or terms of sale. Respondents contended that exchanges of price information might assist them in defending against potential charges that price reductions violated the Robinson-Patman Act. Knowledge of competitors' prices, they maintained, would enable them to show that their own price reductions were made to meet competition rather than to engage in forbidden price discrimination. Respondents also offered additional justifications for the exchange of price information.[8]

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cials of two corporate defendants testified to continued stability from 1966 until September 1968 (App. 1557a-1558a, 2666a. Cf. App. 2308a-2309a). Even in 1969, in areas such as Pittsburgh not subject to single-plant competition, average transaction prices paid by National's customers rose (App. 3683a). Similarly, prices on specialized products, such as vinyl covered wallboard, which were not subject to single-plant competition, remained stable or increased (App. 2677a-2678a, 3700a). Various corporate officials testified that even in times of declining prices the decline probably would have been greater without price information exchanges (App. 1197a, 1518a-1520a, 1967a).

[8] Respondent Watt contended that the exchange would help sellers to avoid being misled by buyers into reducing their prices (App. 3234a-3235a). Other respondents contended that the exchange of price information would help to confirm rumors of price changes by competitors (App. 1329-1331a, 1480a-1481a, 1510a-1512a, 1517a-1520a, 2033a-2035a, 3443a-3445a, 3613a). These "defenses" appear to amount to concessions that the exchange of price information was used to stabilize prices. The testimony of other witnesses relied upon by respondents also tends to indicate that the stabilization of prices was a desired goal of the exchange of price information. See App. 548a, 590a-591a.

The district court instructed the jury that it could conclude that the exchange of price information violated the Sherman Act if it found either (a) that respondents exchanged price information for the purpose of affecting prices or (b) that the result of the exchange (regardless of its purpose) was to fix or stabilize prices (App. 3884a). The jury found respondents guilty; the district court fined all respondents and sentenced the individual respondents to suspended terms of imprisonment (App. A, *infra*, p. 5a n. 4).

The court of appeals unanimously rejected respondents' claim of unconstitutional pre-accusation delay (App. A, *infra*, pp. 5a-11a). The panel divided, however, with respect to the proper disposition of three other criminal procedure issues and the antitrust issue.

Judges Hunter and Adams, over the dissent of Judge Weis, concluded that the district court should have instructed the jury that if respondents' sole purpose in exchanging price information was to establish a defense to price discrimination charges, then the exchanges were lawful notwithstanding their effects upon prices. In their view, *United States* v. *Container Corp. of America*, 393 U.S. 333, allows competitors to exchange price information, despite a stabilizing effect on prices, "[w]here the information exchange occurs under a 'controlling circumstance'" (App. A, *infra*, p. 18a). The court held that a purpose to acquire information that might be pertinent to a defense against price discrimination charges was

such a "controlling circumstance" and therefore would establish a defense to charges under the Sherman Act (*id.* at 12a-29a).[4]

Judge Hunter concluded that the instructions to the jury had not made it sufficiently clear that each defendant could be convicted only if shown to have joined in the overall venture, and not just in some subsidiary agreement (App. A, *infra*, pp. 29a-36a). He also concluded that the instructions had improperly limited the jury's consideration of respondents' arguments concerning withdrawal from the conspiracy (*id.* at 36a-39a). Judges Adams and Weis did not agree with these conclusions (*id.* at 29a n. 11, 39a n. 16, 50a), and Judge Weis stated that Judge Hunter had concentrated on isolated instructions to the detriment of the instructions as a whole (*id.* at 56a-63a).

Judge Adams concluded that a conversation between the district judge and the foreman of the jury after several days of the jury's deliberations coerced the jury to reach a verdict (App. A, *infra*, pp. 40a-49a). Judge Hunter did not express an opinion on this subject, and Judge Weis concluded that the communication with the foreman was not coercive (*id.* at 63a-69a).

[4] The court stated that the jury should be instructed that a price information exchange is lawful, regardless of its effects, if (1) it is undertaken solely to establish a defense to Robinson-Patman Act charges; (2) a seller first resorts to all reasonable means of price verification other than discussing price with its competitor; (3) the seller seeking price verification has a good reason to doubt the veracity of price representations made by a buyer; and (4) each price communication with a competitor concerns only one price and one buyer. See App. A, *infra*, pp. 28a-29a.

Judge Weis, dissenting with respect to the antitrust holding, stated that the majority had accepted an argument that had been rejected by this Court in *Container* (App. A, *infra*, pp. 50a-55a). He concluded that the Robinson-Patman Act does not require a seller to undertake a price "investigation which itself is illegal either because it results in price fixing or violates other provisions of law" (*id.* at 53a).

REASONS FOR GRANTING THE PETITION

1. This case presents an important question arising out of superficial tension between Section 1 of the Sherman Act and Section 2(b) of the Robinson-Patman Act. Section 1 prohibits exchanges of price information among competitors, at least where such exchanges have the effect of fixing or stabilizing prices. *United States* v. *Container Corp. of America*, 393 U.S. 333. Section 2(b) of the Robinson-Patman Act establishes that a price offered to "meet competition" does not violate that statute's prohibition against price discrimination. The court of appeals, in an attempt to "reconcile" these statutes, has created a defense that is unnecessary to serve the purposes of the Robinson-Patman Act and that is detrimental to the purposes of the Sherman Act.

Despite the absence of a conflict among the courts of appeals on the question presented here,[5] it is im-

[5] Other decisions seem to recognize an even more expansive defense in private treble damages actions. See *Gray* v.

portant for the Court to consider the question in the present case. The court of appeals' decision seriously undermines the effectiveness of the Sherman Act in preventing subtle means of price fixing. Moreover, the very existence of the opinion of the court of appeals in this case may give rise, in the future, to claims of "good faith reliance" that, although not establishing a mistake of law defense, may make successful prosecution more difficult.[8] Competitors may be expected to attempt to capitalize upon the present decision (see B.N.A., Antitrust & Trade Regulation Report No. 808, pp. B-1 to B-4 (April 7, 1977)), and a trial under the rules established by the present decision would be considerably more complex than price-fixing trials now are. Prompt consideration of the question would avert these dangers, and the Federal Trade

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Shell Oil Co., 469 F.2d 742, 746-747 (C.A. 9), certiorari denied, 412 U.S. 943; *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (C.A. 10), certiorari denied, 408 U.S. 928; *Webster* v. *Sinclair Refining Co.*, 338 F. Supp. 248 (S.D. Ala.); *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal.). The court of appeals declined to follow these cases to the extent that they would allow *all* exchanges of price information to be justified by a professed fear of price discrimination (see App. A, *infra*, pp. 22a-26a). On the other hand, *L.C.L. Theatres, Inc.* v. *Columbia Pictures Industries, Inc.*, 421 F. Supp. 1090, 1107 (N.D. Tex.), appeal pending, C.A. 5, No. 76-3421, supports the position that we urge in this petition.

[8] The Department of Justice has announced, in this petition and in public statements, that it does not agree with the decision of the court of appeals. Competitors who exchange price information therefore may not rely upon a "mistake of law" defense. See ALI, *Model Penal Code* § 2.04(3)(b) (P.O.D. 1962).

Commission joins with the United States in urging review.[9]

a. Container holds that price information exchanges violate the Sherman Act where they have the purpose or effect of fixing or stabilizing prices. They do so for a number of reasons. Price information exchanges serve to stabilize prices because they quickly alert competitors to any price reduction; in an oligopolistic industry, no competitor would seek to reduce its own price unless it could recoup, in greater sales volume, the loss in per-unit profit. The prospect of delay between reduction of price by one competitor and a decision by other competitors to follow suit is an essential incentive to price-cutting; if reductions were matched immediately by other sellers, the price-cutter would be deprived of the increased sales volume that it sought to generate. Routine exchange of price information would facilitate price matching and deprive sellers of this important incentive to reduce prices.[10]

Moreover, agreements to exchange price information also are useful if not essential to "police" an agreement to fix prices. The exchange of price information deters cheating, because other conspirators

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[9] The Commission has requested the Department to seek review in the present case. A copy of the Commission's letter is reproduced in App. E, *infra*, pp. 95a-100a.

[10] See generally Nutter and Moore, *A Theory of Competition*, 19 J. Law & Economics 39 (1976), for a discussion of the role of ignorance of competitors' prices in promoting price reductions.

would quickly discover the price reduction and retaliate against the price-cutter. In light of these considerations, the policies of the Sherman Act are best served by preventing competitors from exchanging current price information.[11]

b. Container involved an agreement among sellers to exchange current price information about specific customers. The district court held that the exchange was not illegal, reasoning in part that the exchange was a legitimate means of preventing customers from inducing lower prices by misrepresenting offers received from competitors. 273 F. Supp. 18, 59-61. This Court, however, held that the Sherman Act was violated if the exchange of price information stabilized prices, and it rejected the district court's contrary conclusion without separate discussion. The Justices disagreed whether it had been shown that the defendants' activities had in fact stabilized prices, but all nine Justices concluded that such an effect would be a sufficient foundation for the imposition of liability, without respect to the purpose of the exchange. See 393 U.S. at 337 (opinion of the Court), 339 (Fortas, J., concurring), 343 (Marshall, J. dissenting).

Container therefore does not support the court of appeals' conclusion that an exchange of price information that has the effect of fixing or stabilizing prices nevertheless may be excused by a benign motive. The court of appeals thought that a desire to estab-

[11] See Areeda, *Antitrust Analysis* 292 (1974); Kaysen and Turner, *Antitrust Policy* 179-180 (1965); Posner, *Antitrust Law: An Economic Perspective* (1976).

lish a defense to a charge of price discrimination would be a "controlling circumstance" justifying the forbidden effect on prices (App. A, *infra*, pp. 17a-29a), but this seriously misreads the Court's reference in *Container* to "controlling circumstances."

The Court explained in *Container*, 393 U.S. at 335, that *Cement Manufacturers Protective Association* v. *United States*, 268 U.S. 588, which had found a price exchange program to be not unlawful, was based upon the "controlling circumstance" that cement manufacturers were entitled to protect themselves against fraud. But *Cement* is quite unlike the present case, for it involved the exchange of price information about completed transactions, and the exchange had no effect upon price. 268 U.S. at 602-606.[12] The Court's reference to *Cement* as involving a "controlling circumstance" can hardly be understood as extending an invitation for lower courts to make broad exceptions to the basic rule that price information exchanges are improper when they fix or stabilize prices. Implied exceptions to the Sherman Act are not lightly created,[13] and the holding of *Container* itself indicates that the Court had rejected the attempt, by the district court, to allow a "good motive" exception.[14]

[12] See also *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 781.

[13] *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719-720 (collecting cases).

[14] See the analysis of the district court's decision in *Container* at App. A, *infra*, pp. 51a-53a.

c. The conflict between the Sherman Act and the Robinson-Patman Act perceived by the court of appeals is illusory. Although the court of appeals found in the Robinson-Patman Act "commands" and "duties" that it thought to be inconsistent with the rules established by the Sherman Act (App. A, *infra*, p. 19a n. 9), there are no such commands. Section 2(b) of the Robinson-Patman Act permits a competitor to meet a lower price but never compels it. The defense rests upon a recognition of competitive rivalry, and it was not designed as a justification for competitive collaboration. It is not illegal to match a competitor's price, but the desire to do so should not excuse engaging in conduct, otherwise illegal under the Sherman Act, that fixes or stabilizes prices.

A seller may perfect its defense to a charge of price discrimination by doing everything reasonably feasible—except violating some other statute, such as the Sherman Act—to verify a buyer's statement that the buyer has been offered a lower price. If the seller cannot ascertain by making reasonable lawful inquiries that the buyer is lying, the seller is entitled to make the sale.[15] Section 2(f) of the Robinson-Patman Act provides that it is illegal for a buyer to attempt to induce a seller to grant a price discrimination. A seller that cannot lawfully verify that a

[15] The Federal Trade Commission agrees with this construction of the Robinson-Patman Act. See App. E, *infra*, pp. 97a-99a. See also *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 176; *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746, 757-760.

prospective buyer is lying is entitled to assume that the buyer is obeying Section 2(f).

The court of appeals reasoned (App. A, *infra*, pp. 21a-22a) that disallowance of the defense respondents sought to present would discourage competition by discouraging sellers from aggressively lowering their prices. This argument not only is inconsistent with the economic analysis we have presented at pages 11-12, *supra*, but also is inconsistent with the jury's verdict."[16] The jury was charged that it could convict if it found that the exchange of price information fixed or stabilized prices. Thus, as Judge Weis pointed out (App. A, *infra*, 52a), "the jury verdict establishes the fact of effect upon prices." [17] As this case stands, the jury has found beyond a reasonable doubt, on evi-

[16] The court of appeals' analysis also fails because it rests upon the assumption that, in an oligopolistic industry, scattered price reductions should be encouraged. But selective price reductions to "meet competition" do not yield lower prices to buyers. If a seller verifies that a competitor made the offer that the buyer represented it received, the seller's match of that offer would not benefit the buyer. And if the seller learns that the buyer is lying, the seller would not reduce its price. Price verification therefore does not lead to lower prices. The position we take here would induce sellers to make general price reductions rather than selective reductions.

[17] The jury also was instructed that it could convict if it found that respondents had a purpose to fix or stabilize prices. But if the jury found such a purpose, it necessarily would have concluded that respondents did not act for the sole purpose of establishing a "meeting competition" defense. Judge Weis therefore properly treated the jury's verdict as if it stood entirely on proof of effect on prices.

dence the court of appeals found to be sufficient (*id.* at 10a, 12a) that respondents' conduct had an anticompetitive effect.[18] In these circumstances, to recognize the defense respondents sought to present would be to allow competitors to produce anticompetitive effects in the name of a good faith desire to do something that, at best, is simply "not illegal" under another statute. The defense would have a deleterious effect upon competition in olgopolistic industries, for it would afford competitors a relatively painless way to avoid the strictures of the Sherman Act.

2. The United States prevailed on all of the other issues in this case, and none of those issues independently would warrant review by this Court. But because two different judges voted against the United States on different issues, a reversal by this Court of the antitrust issue alone would require that this case be remanded for a second trial. The first trial was complex, consuming 19 weeks and producing great volumes of testimony and exhibits. If the Court decides that review of the antitrust issue is appropriate then it should grant review of the three criminal procedure issues as well, in order to enable this litiga-

[18] The court in *Wall Products Co.* v. *National Gypsum Co.*, *supra*, 326 F. Supp. at 311-312, also found that the practice of exchanging prices stabilized prices in the gypsum board industry. The record in the present case, and in *Wall Products*, convincingly establishes that competition in the industry was initiated by smaller producers rather than by respondents. See 326 F. Supp. at 305-306, 317, and App. 389ex-390ex, 408ex.

tion to be brought to a close without the necessity of another protracted trial."[19]

a. Jury instructions must be read as a whole, and if as a whole they contain "an adequate statement of the law to guide the jury's determination" (*United States* v. *Park*, 421 U.S. 658, 675) the verdict should be upheld even if better instructions could have been given. Under this standard the charge with respect to each respondent's participation in the conspiracy was adequate. The district court made it clear that each defendant must join the entire conspiracy and not some sub-agreement.[20] See the excerpts of the

[19] Review of the criminal procedure issues also would resolve a dilemma the district court otherwise would face on remand. The court of appeals held, by a divided vote on each issue, that the district court did not err in its instructions. The law of the case therefore would require the court to give the same instructions at a second trial. Yet if the district court were to do so, it would be reversed a second time if the case were to return to the same panel of the court of appeals. Judge Adams suggested (App. A, *infra*, p. 50a) that the district court would be well advised to give the instructions that Judge Hunter thought were necessary, but that Judges Adams and Weis thought were unnecessary. But, if it is possible to avoid doing so, a district court should not be required to give instructions that the court of appeals already has held are unnecessary, and perhaps unduly favorable to respondents.

[20] Judge Hunter, who alone concluded that the instructions were deficient, relied upon *United States* v. *Borelli*, 336 F.2d 376 (C.A. 2), certiorari denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (see App. A, *infra*, pp. 29a-36a). But in *Borelli* "inclusion of all the [defendants] in a single conspiracy • • • [was] something of a *tour de force*" (336 F.2d at 380). The conspiracy in the present case, by contrast, depended upon the participation of all respondents; if

instructions quoted by Judge Weis (App. A, *infra*, pp. 57a-59a). These instructions were more than adequate. *Blumenthal* v. *United States*, 332 U.S. 539, 559-560.

b. The instructions concerning withdrawal from the conspiracy also were adequate. The instructions allowed the jury to find withdrawal not only if a conspirator affirmatively notified law enforcement personnel of withdrawal but also if a conspirator took " 'affirmative action to disavow or defeat' " the conspiracy, including " 'some definite, decisive step, indicating a complete dissociation from the unlawful enterprise' " (App. A, *infra*, pp. 60a, 61a). This instruction was correct.[21] *Fiswick* v. *United States*, 329 U.S. 211, 217; *Hyde* v. *United States*, 225 U.S. 347, 369-370.

c. The district judge's brief colloquy with the foreman of the jury did not coerce the jury into reaching a verdict. After lengthy deliberations of the jury,

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any major producer had withdrawn, price maintenance would have become impossible. This interdepedence distinguishes *Borelli*, which, in any event, has been limited to its facts by the Second Circuit. *United States* v. *Salazar*, 485 F.2d 1272, 1277 n. 9 (C.A. 2), certiorari denied, 415 U.S. 985; *United States* v. *Guanti*, 421 F.2d 792, 800-801 (C.A. 2), certiorari denied, 400 U.S. 832.

[21] The instructions in context make it clear that the "affirmative action" or "decisive step" need not be explicit verbal notification (App. A, *infra*, pp. 60a-63a). The district court allowed respondents to argue to the jury their theory that one or more of them withdrew by resuming competitive pricing (*id.* at 63a), and the district court was not obliged to repeat this theory to the jury *in haec verba* in its instructions.

counsel for respondents consented to a private meeting between the judge and the foreman of the jury. The following was said (App. A, *infra*, pp. 43a-44a):

> Mr. Russell [foreman]: • • • It is a situation I don't know how to help you get what you are after.
>
> The Court: Oh, I am not after anything.
>
> Mr. Russell: You are after a verdict one way or the other.
>
> The Court: Which way it goes doesn't make any difference to me.

Judge Adams concluded (*id.* at 44a-49a) that this exchange coerced the jury into reaching a verdict. Although Judge Adams believed that the judge's statement "Which way it goes doesn't make any difference to me" amounted to an instruction to reach a verdict one way or the other, it is just as natural to read the statement as expressing disinterest in whether the jury reaches a verdict or deadlocks, or as denying prejudice for or against respondents. The latter readings would be sounder. Three times the judge had instructed the jury that its members were not to surrender an "honest conviction • • • for the purpose of reaching a verdict" (App. 3950a, 4014a, 4018a). During the meeting with the foreman, the judge requested the jury to continue deliberating "for the time being", and his parting words to the foreman were to "see if they can come to a verdict" (App. 4068a, 4070a), clearly a conditional request. Judge Weis therefore correctly argued that the colloquy did not,

in context, coerce the jury to reach a verdict (App. A, *infra*, pp. 63a-69a).[22]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1977.

[22] Moreover, although the foreman reported that the jury was unable to agree and was experiencing personality conflicts, Judge Weis accurately observed that respondents bore part of the responsibility for this in light of their demand that the jury continue its deliberations through a weekend without adequate rest. See App. A, *infra*, pp. 65a-69a.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 75-1836 through 75-1842

UNITED STATES OF AMERICA, APPELLEE,

v.

UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, GEORGIA-PACIFIC CORPORATION, KAISER GYPSUM COMPANY, INC., THE CELOTEX CORPORATION, THE FLINTKOTE COMPANY, GRAHAM J. MORGAN, ANDREW J. WATT, COLON BROWN, J. P. NICELY, WILLIAM H. HUNT, CLAUDE E. HARPER, ROBERT A. COSTA, WILLIAM D. HERBERT, GEORGE J. PECARO, JAMES D. MORAN

UNITED STATES GYPSUM COMPANY,
APPELLANT IN 75-1836,

NATIONAL GYPSUM COMPANY,
APPELLANT IN 75-1837,

GEORGIA-PACIFIC CORPORATION,
APPELLANT IN 75-1838,

THE CELOTEX CORPORATION,
APPELLANT IN 75-1839,

COLON BROWN,
APPELLANT IN 75-1840,

J. P. NICELY,
APPELLANT IN 75-1841,

ANDREW J. WATT,
APPELLANT IN 75-1842.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(Criminal No. 73-347)

Argued June 21, 1976

Before ADAMS, HUNTER and WEIS, *Circuit Judges*

(Filed January 6, 1977)

HUNTER, *Circuit Judge*:

This is an appeal by United States Gypsum Company (USG), National Gypsum Company (National), Georgia-Pacific Corporation (G-P), The Celotex Corporation (Celotex), Andrew J. Watt, Colon Brown, and J. P. Nicely, defendants in a complex case under Section 1 of the Sherman Act, 15 U.S.C. § 1.[1] Each corporate defendant manufactures, sells, and distri-

[1] Section 1 reads in pertinent part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

butes gypsum board products, which are widely used in the construction industry. Watt is Executive Vice President of USG. Brown is Chairman of National's Board of Directors, and Nicely recently retired as Vice President for Sales in National's Building Products Division.[2] For the reasons that follow, we reverse and remand.

I.

Gypsum board is produced in standard sizes, of which 4′ X 8′ X ½″ is the most common. It consists of a layer of gypsum rock sandwiched between sheets of heavy paper. Since World War II, it has replaced plaster as the principal component of interior walls in all types of buildings.

The gypsum board industry is highly concentrated. Between 1960 and 1973, the number of producers varied from nine to fourteen, and the eight major producers accounted for more than ninety-four percent of national sales. The corporate appellants together account for more than seventy-five percent of national sales. There are no significant differences in quality or appearance among the standard types of

[2] Each of the corporate defendants received the maximum $50,000 fine. Brown also drew a $50,000 fine, as well as a six-month suspended sentence, and three years probation. Watt received a $10,000 fine, a six-month suspended sentence, and one year probation. Nicely was fined $1,000 and received a six-month suspended sentence and one year probation. After the indictment in this case was handed up, § 1 was amended to provide for a maximum fine of $1,000,000 for corporate defendants and $100,000 for other persons. 15 U.S.C. § 1 (1970), *as amended*, (Supp. IV, 1974).

board produced by the various manufacturers. Demand is determined by activity in the construction industry and is inelastic with respect to price. Because of the homogeneity of the different brands, a buyer's decision to purchase one particular brand is generally based on price. Price discounts and changes in credit terms are the most important form of competition in the industry.

Between 1965 and 1970, the Department of Justice conducted several investigations of possible antitrust violations in the gypsum board industry. In 1971, a grand jury inquiry commenced, and another twenty-eight months of investigation ensued. On December 27, 1973 an indictment was returned in the Western District of Pennsylvania. It named the appellants and nine other defendants [3] as participants in a conspiracy, starting before 1960 and lasting to the date of indictment. (1) to raise, fix, maintain, and stabilize the price of gypsum board; (2) to fix, maintain, and stabilize the terms and conditions of sale of gypsum board; and (3) to adopt and maintain uniform methods of packaging and handling, all in violation of Section 1 of the Sherman Act.

[3] The other defendants were Graham J. Morgan, chairman of the board of USG; William H. Hunt, president of G-P; William D. Herbert, president of Celotex; Kaiser Gypsum Company; Claude E. Harper and Robert A. Costa, Kaiser's president and vice-president, respectively; The Flintkote Company; and George J. Pecaro and James D. Moran, Flintkote's chairman of the board and president, respectively. The indictment named as co-conspirators, but not as defendants, Johns-Manville Corporation; Fibreboard Corporation; and the Gypsum Association, the industry trade association.

All defendants moved for dismissal, alleging the unreasonable pre-indictment delay had worked a denial of their rights to due process of law as guaranteed by the fifth amendment to the United States Constitution. This motion was denied after a five-day evidentiary hearing. Subsequently, the nine defendants who are not parties to this appeal were convicted and sentenced on pleas of nolo contendere.[4] Trial of the remaining defendants began on March 3, 1975, and the jury brought in its verdict on July 15, 1975. The Government called thirty-five witnesses, appellants thirty. The trial record consists of more than 15,000 pages of transcript and some 6500 exhibits.

II.

At the outset, we are met with appellants' contention that the due process clause of the fifth amendment requires dismissal of the indictment. They allege that the Government unduly delayed bringing the indictment and that this delay impaired appellants' ability to present a defense. We affirm the district court's refusal to dismiss the indictment.

[4] Kaiser and Flintkote each received the maximum $50,000 fine. Morgan (USG) received a $40,000 fine, a six-month suspended sentence and two years probation. Hunt (G-P) and Harper (Kaiser) each drew a $40,000 fine, a six-month suspended sentence, and eighteen months probation. Herbert (Celotex), Costa (Kaiser), Pecaro (Flintkote), and Moran (Flintkote) each received a $20,000 fine, a thirty-day suspended sentence, and one year probation.

In *United States* v. *Marion*, 404 U.S. 307 (1971), the Supreme Court indicated that "the Due Process Clause of the Fifth Amendment would require dismissal of the Indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellants' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *Id.* at 324. Because no prejudice was shown, however, the *Marion* Court upheld the indictment. Thus, there was no holding as to the specific requirements of a successful showing of prejudicial delay, and it was unclear whether both prejudice and governmental intent are necessary or whether prejudice alone would suffice. *See, e.g.*, *United States* v. *Barket*, 530 F.2d 189, 194-195 & n. 9 (8th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3518 (U.S. March 16, 1976). We need not resolve this question, because we find neither undue delay nor substantial prejudice.

We consider first the alleged undue delay. Appellants' major argument is that the Government deliberately postponed empaneling the grand jury to await the outcome of a civil case, *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971), involving charges of the same conspiracy. After a lengthy evidentiary hearing, however, the court below found that the interval between the initial investigations of the gypsum board industry and the bringing of the indictment was not unreasonable in light of the extraordinary magnitude of the case and the frequent dead ends encountered by the in-

vestigators. *United States* v. *United States Gypsum Co.*, 383 F. Supp. 462, 464-70 (W.D. Pa. 1974). As the district court noted, *id.* at 467, any delay in empaneling the grand jury resulted from the Government's reluctance to frame criminal charges against appellants before learning whether plaintiffs in a civil action could carry their burden of proof. The district court's findings are not clearly erroneous.

USG separately argues that the Government is collaterally estopped to deny intentional delay, relying on *United States* v. *United States Gypsum Co.*, Civil No. 71-2467 (N.D. Cal., filed Dec. 30, 1971). In that suit against six gypsum companies, the Government sought to recover damages accrued before the start of the normal four-year period, claiming that defendants' fraudulent concealment of their conspiracy had tolled the statute of limitations. The district court granted a motion for partial summary judgment, declaring that the Government did know, or should have known, of the alleged conspiracy prior to January 1, 1968. This finding, insists USG, estops the Government from denying delay in this case.

In *Scooper Dooper, Inc.* v. *Kraftco Corp.*, 494 F.2d 840, 844 (3d Cir. 1974), Judge Garth noted three requirements that must be satisfied before collateral estoppel will apply:

> a) The issue decided in the prior litigation must be identical with the issue presented in the action in question;
>
> b) The prior litigation must have resulted in a final judgent [sic] on the merits; and

c) The party against whom the estoppel is asserted must have been a party or in privity with a party, to the prior adjudication.

USG's claim does not satisfy the first requirement. Governmental knowledge sufficient to preclude reliance on the doctrine of fraudulent concealment in a *civil* case is not identical with the availability of evidence sufficient to support the decision to bring *criminal* charges against the same defendants. Proof of the existence of the former does not entail proof of the existence of the latter. Therefore, there can be no collateral estoppel.

Having found no undue delay, we note that, in any event, appellants have not met their burden of proving substantial prejudice. In *United States* v. *Dukow*, 453 F.2d 1328 (3d Cir.), *cert. denied*, 406 U.S. 945 (1972), this court, following *Marion*, refused to order the dismissal of an indictment where no substantial prejudice was shown. *Accord*, *United States* v. *Benson*, 487 F.2d 978, 984-85 (3d Cir. 1973). In *Dukow*, Judge Adams held the deaths of two potential witnesses not prejudicial, because there had been neither an offer of the testimony they would have given nor any indication that they possessed unique knowledge of the transaction in question. *Dukow*, *supra*, 453 F.2d at 1330. Here, as in *Dukow*, appellants argue that potential witnesses died in the lengthy interval between initial investigation and trial, but there is no showing that the deceased would have proffered testimony not merely cumulative of the evidence already at appellants' disposal.

Of the thirty-six deceased potential witnesses listed, only three received particular attention from appellants. One was Melvin Quayle, who was depicted in other testimony as an emissary of the other alleged conspirators. Quayle's denial before the grand jury of this role was read at trial. Appellants do not suggest that he would have testified any differently had he lived.

Appellants also insist that Donald Miller, late merchandising manager of Celotex, "would have made an excellent witness for the defense." They vouchsafe no reason to believe, however, that Miller's testimony would have been significantly more exculpatory than that offered by other witnesses.

Finally, appellants single out a USG memorandum of June 6, 1961, as a document the Government was able to exploit because its author, B. J. Nabors, was dead. Appellants, though, were free to offer alternative explanations of the document's contents. Moreover, Nabors died in 1967, ten months before the date on which USG claims the Government should have known of the conspiracy and sought an indictment. Cases of this magnitude often last so long that documents are introduced when the authors are no longer available to dispel any inculpatory impressions the documents may create. To hold that this handicap, by itself, is a violation of due process would be to erect a practical barrier to suits of this sort.

Appellants argue that under *United States* v. *Barket*, *supra*, the Government bears the burden of

proving that none of the unavailable witnesses possessed exculpatory evidence. We find this argument unpersuasive. *Barket* differs from the case *sub judice* in several important respects. First, the procedural posture of *Barket* was the reverse of that here: the district court had granted the motion to dismiss the indictment. Second, the *Barket* court expressed grave misgivings about the merits of the Government's case. Third, the Eighth Circuit found the Government guilty of culpable negligence in delaying Barket's indictment. Fourth, and most important, the *Barket* court explicitly found that "Barket's ability to defend himself on the crucial issue" had "undoubtedly" been impaired. *Id.* at 193.

None of these conditions obtains in the case before us. Because the court below refused to dismiss the indictment, we can order it dismissed only if we hold the district court's findings clearly erroneous. We are unable to take the frankly skeptical view of the Government's case on the merits, adopted by the *Barket* court. As we have already noted, the Government did not cause any undue delay in this case. Most importantly, we do not find that appellants' ability to defend themselves was impaired. Because the *Barket* court explicitly reached the opposite conclusion, its statement concerning the burden of proof on the issue of missing witnesses' possession of exculpatory evidence was dictum.[5] And were the state-

[5] In concluding that the Government bears the burden of proving that no unavailable witness would have offered significant, exculpatory evidence, the *Barket* court relied on United States v. Norton, 504 F.2d 342 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). Norton, however, involved an unusual situation. The Government intentionally delayed its arrest of Norton on drug charges so that its informant, a key witness, could remain undercover and gather evidence for other prosecutions. Before Norton's arrest, the informant was murdered. The Eighth Circuit held that the Government had to accept the risk that its conscious decision to delay Norton's prosecution might result in the unavailability of a witness necessary to guarantee Norton a fair trial. Therefore, the burden of showing the informant's lack of exculpatory evidence was placed on the Government. Norton, however, was held to have waived the right to argue that the delay had prejudiced his defense, because he had rejected the Government's offer of proof on the issue of the informant's probable testimony. *Id.* at 453.

Whatever the merits of the *Norton* holding in the context of informant cases, we do not believe that it should be extended beyond that special context. An informant in a drug case is a potential witness who may be presumed to possess unique knowledge about the transaction. Rovario v. United States, 353 U.S. 53, 64 (1957). No such special presumption attaches to the usual witnesses in other cases. *See* United States v. Dukow, 453 F.2d 1328, 1330 (3d Cir.), *cert. denied*, 406 U.S. 945 (1972).

ment indeed necessary to the result in *Barket*, we would see no reason to depart from the clear teaching of *Dukow* and impose upon the Government the burden of proving that none of the unavailable witnesses possessed significant, exculpatory evidence. *See, e.g., United States* v. *McCough*, 510 F.2d 589, 604 (5th Cir. 1975).

III.

Thorough scrutiny of the voluminous record and careful consideration of the many issues raised on appeal convinces us that reversal is required.

A.

The Government's case on price fixing centered on a practice appellants call "verification." An officer of one gypsum board manufacturer would telephone a competing firm's officer to determine the price at which the competitor was offering gypsum board to a specific customer. The scope, purpose, and duration of this activity are sharply disputed by the parties. The Government contends that the purpose of verification was to enable competitors to stabilize prices and "police" agreed-upon increases, that the calls involved broad discussions of present and future pricing policies, that the appellants verified daily, and that they continued to do so until 1973. Appellants insist that the only purpose of the calls was to ensure compliance with the Robinson-Patman Act (discussed below), that the conversations were limited in scope and number, and that the practice had been discontinued, except for a few isolated, unauthorized calls, before the start of the applicable limitations period, December 27, 1968. There is evidence to support each claim of both sides.

Appellants contend, however, that the court below erred in instructing the jury on the legal status of the practice. Although appellants assert that the

evidence demonstrated that the purpose of certification was to comply with the Robinson-Patman Act, the trial court instructed the jury that any purpose was irrelevant so long as the jury found that verification had a stabilizing effect on prices.[6] The refusal to instruct the jury about the relevance of purpose was, for the following reasons, reversible error.

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a),[7] prohibits sellers from discriminat-

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[6] On this point, the court charged as follows:

> Secondly, you must determine whether the purpose for the exchange of competitive information between the Defendants and their alleged co-conspirators was to insure a good faith meeting of competition, as a defense to the Robinson-Patman Act.
>
> If you decide that, if you decide this was merely done in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, standing alone, as establishing an agreement to fix, raise, maintain, and stabilize prices as charged.
>
> However, *if you decide that the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these exchanges as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain and stabilize list prices.*

(Emphasis added).

[7] Section 2(a) reads in pertinent part as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodi-

ing in price between different purchasers of the same commodity. Section 2(b), 15 U.S.C. § 13(b),[5] permits a seller to rebut a prima facie case under 2(a) by "showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." The Supreme Court has held that Section 2(b) places

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ties are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

[5] Section 2(b) reads as follows:

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

> on the seller the burden of showing that the price was made in good faith to meet a competitor's. . . . [T]he statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

Federal Trade Commission v. *A.E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945). This court declared in *Viviano Macaroni Co.* v. *Federal Trade Commission*, 411 F.2d 255, 259-60 (3d Cir. 1969), that the seller cannot meet this burden merely by accepting the purchaser's word with respect to competitor's offers; instead the seller must attempt to corroborate the report, as well as the reliability of the purchaser or other reporter.

Appellants claim that their verification practice was designed to comply with the dictates of *Staley* and *Viviano*. They assert that almost all discounting off list prices was not reflected in invoices, rendering that form of corroboration ineffective. In addition, they say, purchasers of the gypsum board was notoriously unreliable and often were discovered to have lied about a competitor's offer in order to "whipsaw" a price cut. There is evidence to support these assertions. Therefore, argue appellants, they had three choices: (1) offer the reduced price on the basis of the purchaser's unconfirmed report and risk Robinson-Patman liability; (2) forego the price cut and risk losing the sale; or (3) call the competitor, verify

his offer, and establish a section 2(b) defense to any Robinson-Patman charge concerning the price cut.

The countervailing policies of section 1 of the Sherman Act, however, complicate appellants' exposition of the issue. The Supreme Court has dealt several times with the limits imposed by the Sherman Act on exchanges of information among competitors. In *American Column & Lumber Co.* v. *United States*, 257 U.S. 377 (1921), the Court held that section 1 of the Sherman Act condemned the exchange of specific price information with regard to specific customers, where the clear purpose was to stabilize prices. The Court reached the same result in *United States* v. *American Linseed Oil Co.*, 262 U.S. 371 (1923). Then in 1925, two cases upheld the exchange of information among competitors. In *Maple Flooring Ass'n* v. *United States*, 268 U.S. 563 (1925), the Sherman Act was held to permit the exchange of average cost data relating only to closed transactions, despite an apparent stabilizing effect on price, where no intent to constrain individual competitive activity was found. And the Court in *Cement Manufacturers Protective Ass'n* v. *United States*, 268 U.S. 588 approved the exchange of specific price information concerning specific customers, despite possible effects on prices, where the purpose of the dissemination scheme was to prevent buyers from defrauding sellers.

The Supreme Court has drawn a narrow line in deciding the data dissemination cases under section 1 of the Sherman Act. The difficulty derives from the fact that in competitive markets, information ex-

changes promote competition, while in oligopolistic markets, they depress competition. *United States* v. *Container Corp. of America*, 393 U.S. 333, 342-43 (1969) (Marshall, J., dissenting); P. AREEDA, ANTITRUST ANALYSIS 13-16 (1974). Thus, the Court has attempted to fashion rules that will reach the latter, yet not amount to broad proscriptions embracing the former.

In *Container*, *supra*,—the most recent data dissemination case—the facts were similar to those presented in the case *sub judice*. Eighteen manufacturers of corrugated containers accounted for 90% of the shipments of such products from the southeastern United States. The industry exhibited excess capacity and a downward trend in prices, yet twenty-one new competitors entered the industry during the period covered by the complaint—a clear indication that prices were above competitive levels. Containers were produced to customer specifications, but were substantially identical regardless of manufacturer. With a few exceptions, no manufacturer could command a higher price than another. From 1955 to 1963, defendants exchanged with varying frequency the prices most recently quoted to specific customers. No Robinson-Patman defense was raised, however.

The Supreme Court, 6-3, found a combination or conspiracy proscribed by the Sherman Act. The freedom to supply information only if each defendant so chose was described merely as the freedom to withdraw from the agreement. From the concentrated na-

ture of the industry, the majority concluded that the information exchanges must have set a floor under prices. The Court distinguished *Cement Manufacturers, supra*, by pointing out that *Container* revealed no "controlling circumstance, *viz.*, that cement manufacturers . . . exchange price information as a means of protecting their legal rights from fraudulent inducements . . . ." *Id.* at 335.

Mr. Justice Fortas concurred, declaring that he did not understand the majority to have established a *per se* ban of such exchanges. Instead, he concluded that the record supported a finding that the data dissemination had in fact affected prices. *Id.* at 338-40 (Fortas, J., concurring). Justice Marshall, joined by Justices Harlan and Stewart, dissented. He agreed that exchanges of price information were not illegal *per se*, but he disagreed with Justice Fortas' conclusion that the record showed any effect on prices. *Id.* at 340-47 (Marshall, J., dissenting).

Each of the *Container* opinions found an agreement in the reciprocal dissemination of price information. The discord arose over proof of the agreement's effect. None of the Justices concerned himself with the agreement's purpose. The Court's careful distinction of *Cement Manufacturers*, however, suggests that proof of an actual purpose is not irrelevant in all cases. Where the information exchange occurs under a "controlling circumstance," such as the purpose of preventing fraud in *Cement Manufacturers*,

the exchange can be upheld under the Sherman Act, despite a proven or presumed effect on price.[9]

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[9] If purpose were always irrelevant, as Judge Weis's dissent declares, then the *Container* Court would effectively have overruled *Cement Manufacturers*. *See The Supreme Court*, 1968 Term, 83 Harv. L. Rev. 7, 234-5 (1960). Yet the vitality of *Cement Manufacturers* has been reaffirmed by favorable citation in Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 773, 781, *reh. denied*, 423 U.S. 886 (1975), and United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 113 (1975). Those cases also cite Justice Fortas's *Container* concurrence, suggesting that *Container* did not establish a *per se* rule against information exchanges, but left some to qualify as legitimate under the Sherman Act.

Judge Weis's dissenting opinion also attempts to liken the factual setting in the case *sub judice* to that found violative of the Sherman Act in *Container*. The dissent notes, that the district court in *Container* found that buyers "on occasion" furnished inaccurate information as to competing sellers' prices, *see* United States v. Container Corp. of America, 273 F. Supp. 18, 28 (M.D. N.C. 1967), and held that the desire to prevent fraud took the container manufacturers outside the Sherman Act ban.

All this is irrelevant to the case at hand. Here, fraud is not at issue. Indeed, the *Container* opinion makes it clear that mere bad faith bargaining does not amount to "fraud" in the *Cement Manufacturers* sense.

What appellants urge here, though, is not a desire simply to avert occasional bad faith bargaining, but to comply with the positive duties imposed by another statute, the Robinson-Patman Act. The Robinson-Patman defense was not raised by the *Container* defendants at trial and was argued to the Supreme Court merely as an afterthought. That Court did not deal with it.

The question before us, then, is not whether occasional, or even wide-spread buyer prevarication justifies price information exchanges, but whether the commands of Robinson-Patman may sometimes do so, when accommodated to Sherman Act strictures.

The question before us is whether appellants' alleged desire to establish a defense, to price discrimination charges, of compliance with section 2(b) of the Robinson-Patman Act would create a similar "controlling circumstance" that would legitimate an agreement otherwise prohibited by section 1 of the Sherman Act. If it would, then the trial court's instruction was improper in permitting the jury to convict appellants merely by finding an effect on prices, with no consideration of purpose. The Government denies that compliance with section 2(b) amounts to a "controlling circumstance." *Container*, claims the Government, limited "controlling circumstances" to prevention of fraud.

We do not read that case so narrowly. If the *Container* Court had sought to restrict the exception to "prevention of fraud," it could have distinguished *Cement Manufacturers* by noting simply that the *Container* case did not involve an attempt to thwart fraudulent purchasing practices, as had *Cement Manufacturers*. Instead, the Court used that much broader term "controlling circumstance," one of which was the desire to prevent fraud present in the latter case. This suggests that there are "controlling circumstances" other than the one delineated in *Cement Manufacturers*.

Price verification, insist appellants, must be considered a controlling circumstance. They claim that otherwise the very activity dictated by the Robinson-Patman Act could be used as evidence of conspiracy to convict under the Sherman Act. This conflict be-

tween the two acts would leave them with their three unappealing alternatives: (1) forego the price cut and probably lose a sale; (2) cut the price and risk a Robinson-Patman charge, if the buyer was lying; or (3) verify the price and risk the Sherman Act charge involved here.

The Government replies that nothing in the Robinson-Patman Act condones discussions about prices among competitors, nor has any court ever required such discussions as a condition of establishing a section 2(b) defense. Section 2(b), says the Government, does not force appellants to verify. The Government poses its alternatives for the appellants: (1) refrain from cutting prices to the single buyer; (2) cut prices as to all buyers. In neither event will the seller break either antitrust law.

Even the Government concedes that this choice is "difficult." We fear that so limiting sellers' alternatives would discourage price competition in industries like gypsum board, where the fact that price cutting occurs off list prices and invoices makes corroboration of reported competitor's offers difficult or impossible. In such industries, the Government's alternatives would eliminate the section 2(b) defense. This, it seems to us, would be more likely to put a floor under prices than to induce wholesale cutting, since a firm in a concentrated industry would be unlikely to reduce prices across the board simply to close a single sale. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 181 (1955). And it is through isolated

price reductions that established price levels are eroded, precipitating widespread price cuts. P. AREEDA, *supra*, at 231. The Government's position, then, could induce greater price rigidity.

Because the Government's resolution of the conflict because the Sherman and Robinson-Patman Acts would require us to read the Sherman Act as discouraging the very price competition it was designed to promote, we reject that resolution. Appellants, however, seek an accommodation of the two acts that would recognize any bona fide attempt to comply with section 2(b) of Robinson-Patman as a "controlling circumstance" for Sherman Act purposes. Anti-competitive dangers exist on this side, too. Such a resolution would countenance a broad range of data dissemination schemes and communications among competitors, which might provide camouflage for illegitimate agreements. With this problem in mind, we turn to the cases that have already addressed this issue.

Except for the court below, each court to consider the issue has agreed with appellants that the attempt to establish a 2(b) defense amounts to a "controlling circumstance" that shields those exchanging information from Sherman Act liability. The first and most apposite case involved a civil action alleging essentially the same conspiracy charged here. In *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971), the court found that manufacturers of gypsum board, because their products were homogeneous, deemed it essential to meet lower

offers by competitors. Purchasers aggressively played one manufacturer against another, whipsawing a series of price cuts through the industry by falsely reporting lower offers. When purchasers told sellers' field representatives of competitors' lower offers, the representatives asked for invoices or other written corroboration, but these requests usually proved fruitless. In order to insulate themselves against possible Robinson-Patman liability, specific company officials were given authority to communicate with the competitor in question. This communication took place "only after exhausting other means of confirming the truth of such reported deviation." *Id.* at 309. Specific confirmation was obtained, and no reported offers were met unless verified. The *Wall Products* court held that this activity amounted to a "controlling circumstance" contemplated by *Container.* 326 F. Supp.

The three other cases that involved this issue shared similar facts. In each, a major oil company conferred with its competitors during a gasoline price war, in order to verify its competitors' prices before granting temporary allowances to its own local retailer. Although it is not made clear in *Webster* v. *Sinclair Refining Co.*, 338 F. Supp. 248 (S.D. Ala. 1971), whether the defendant communicated directly with competitors or merely observed publicly posted prices, the court must have thought that there was direct communication. It stated that obtaining information from competitors does not violate section 1

of the Sherman Act if the "controlling circumstance" of Robinson-Patman compliance is present, citing *Wall Products*, 338 F. Supp. 251-52.

In *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), the competitors exchanged price information that was also publicly available through trade journals and financial dailies. *Id.* at 181. The court cited *Wall Products*, however, for the broad proposition that price information exchanges for the purpose of establishing a Robinson-Patman defense amount to a "controlling circumstance." *Id.* at 182.

The third gasoline war case was *Gray* v. *Shell Oil Co.*, 469 F.2d 742, 746-47 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). There the court held that the jury had to decide whether the purpose of Shell's communications with its competitors was to comply with the Robinson-Patman Act. Because the jury had found that purpose, the court upheld a verdict of no liability, citing *Belliston*, *supra*.

First, it should be noted that the three gasoline war cases significantly expanded the *Wall Products* holding. None contained any suggestion that alternative means of corroboration, such as invoices or public trade papers, were unavailable, as they had been in *Wall Products*. Indeed, the *Belliston* court expressly found that they were available. None indicated that the gasoline retailers had achieved the same reputation for mendacity that the Wall Products court ascribed to wallboard buyers. The gasoline war cases, then, suggest that the category of price exchanges that qualify as "controlling circumstances" is quite broad. So free a license to exchange price information might undermine the *Container* holding.

Second, these cases diluted the pro-competitive strength of the Sherman Act in order to preserve the force of Robinson-Patman's requirement of solid corroboration. Yet *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953), suggests that when policies of the Sherman and Robinson-Patman Acts conflict, it is the Robinson-Patman Act that should give way. In *Automatic Canteen*, a buyer was charged with violating section 2(f)[10] of the Robinson-Patman Act, which forbids inducement of a discriminatory price. The question before the Court was which party—the FTC or the defendant—had the burden of producing evidence on the issue of the seller's costs, information that might demonstrate that the varying prices were not in fact discriminatory. The Court refused to place the burden of discovering the seller's costs upon the buyer because, among other things, "it would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other

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[10] Section 2(f), 15 U.S.C. § 13(f), reads as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

antitrust policies," *id.* at 69, that is, section 1 of the Sherman Act.

We are therefore reluctant to embrace the accommodation fashioned by the gasoline war cases, which seems to eviscerate the Sherman Act for the benefit of Robinson-Patman. The best way to resolve the dilemma framed by appellants in this case, in the light of *Automatic Canteen*, would be to ease their burden under Robinson-Patman, instead of facilitating evasions of the Sherman Act's pro-competitive strictures as did the gasoline war cases. If Robinson-Patman is interpreted to permit a seller lacking other corroboration to cut his price without taking the ultimate corroborative step of verifying the purchaser's report with his competitor, then the Sherman Act and *Container* retain more vigor. We think *Wall Products*, *Viviano*, and a recent case in the Sixth Circuit outline such a solution to appellants' alleged dilemma.

In *Kroger Co.* v. *Federal Trade Commission*, 438 F.2d 1372 (6th Cir.) *cert. denied*, 404 U.S. 871 (1971), the Sixth Circuit affirmed an FTC finding that Kroger had induced a discrimination in price, in violation of section 2(f) of the Robinson-Patman Act. In soliciting bids for sale of private label milk to its chain of grocery stores, Kroger falsely told Beatrice Foods that it had received a bid twenty percent off list price from another dairy. The FTC found that Beatrice attempted to corroborate Kroger's report, but did not contact its competitor directly.

Beatrice Foods Co., 76 F.T.C. 719, 809-11 (1969). Relying on Kroger's false report, Beatrice cut its price to Kroger. Both Beatrice and Kroger were charged with violating the Robinson-Patman Act. The FTC, however, held that Beatrice had established the "good faith meeting competition" defense under section 2(b). Despite this finding that the price was not illegal as to the seller, Kroger was held to have induced a discriminatory price. The FTC declared that Beatrice could not be held liable for the discriminatory effect of the price, because it had no reason to disbelieve Kroger. The Sixth Circuit affirmed the ruling that Kroger could nevertheless be held to have known that the price it induced was in fact discriminatory. *Kroger*, *supra*, 438 F.2d.

The *Kroger* case, when combined with the *Wall Products* decision and our *Viviano* holding, offers a solution to the quandary in which appellants claim to find themselves. *Kroger* indicates that sellers can establish a section 2(b) defense without taking the ultimate corroborative step of communicating directly with their competitors. It accomplishes this by holding the purchaser to a high standard of good faith bargaining under section 2(f). Thus, as long as the seller has taken all other reasonable steps in an attempt to corroborate his purchaser's report of lower offers, he need not fear Robinson-Patman liability, provided that—as in *Kroger*—he has no independent reason to doubt the purchaser's reliability.

Viviano, though, requires the seller to investigate that reliability. *Viviano*, *supra*, 411 F.2d at 259. This

holding protects the integrity of the section 2(b) defense. If the seller could discriminate in price when he had good reason to believe that the buyer—even a buyer held to a high standard by *Kroger*—was lying about a competitor's supposedly lower offer, then the "good faith" requirement of section 2(b) would be rendered nugatory. Therefore, if previous experience or the investigation required by *Viviano* reveals that the purchaser cannot be trusted, as was the case in *Wall Products*, *supra*, 326 F. Supp. at 309, then, and only then, the seller may communicate with his competitor to test the buyer's veracity. The presence of this doubt as to the purchaser's truthfulness, combined with the seller's inability to corroborate the buyer's reports independently, creates the "controlling circumstance" that exempts price information exchanges from the Sherman Act ban, under *Container*. This is a narrow "controlling circumstance," not the broad one of the gasoline war cases.

There was some evidence of this narrow "controlling circumstance" in this case. Several witnesses testified that the purpose of the "verification" calls was to establish a Robinson-Patman defense and that their scope was confined by that purpose. There was also testimony concerning the unreliability of purchasers in the gypsum board market. Therefore, appellants were entitled to an instruction that their verification practice would not violate the Sherman Act if the jury found: (1) the appellants engaged in the practice solely to comply with the strictures

of Robinson-Patman; (2) they had first resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue. Trial court charged instead that if the jury found that verification had an effect on prices, they had to find guilt under the Sherman Act. Because this charge improperly ignored *Container's* exception for price information exchanges carried out under a "controlling circumstance," reversal is required.

B.

Appellants also contend that, on the state of the evidence, they were entitled to a more precise charge on the purpose and scope of the conspiracy any particular defendant was alleged to have joined. The Government insists that the trial court's charge on this point was sufficient and that appellants waived their objections in any event. I agree with appellants that the court's charge was deficient. Finding no waiver, I would order reversal on this point.[11]

Over a period of five months, the Government introduced masses of evidence concerning a multitude of seemingly unrelated events and attempted to link them together to show a single, overall conspiracy to stabilize the prices and marketing conditions of gyp-

[11] Neither Judge Adams nor Judge Weis agrees with this view.

sum wallboard. Most of this evidence dealt with actions prior to the start of the applicable limitations period. In these circumstances, it was necessary specifically to inform the jury that any particular defendant could be found guilty of conspiracy only if he understood that he had joined the single, overall agreement charged in the indictment; participation in any of the subsidiary events was not enough. *United States* v. *Peoni*, 100 F.2d 401, 403 (2d Cir. 1938); *accord*, *United States* v. *Purin*, 486 F.2d 1363, 1369 (2d Cir. 1973), *cert. denied sub nom. Da Silva* v. *United States*, 416 U.S. 987 (separate appeal), *cert. denied sub nom. Purin* v. *United States*, 417 U.S. 930 (1974) (separate appeal). The great number of activities in evidence and the huge cast of characters involved made it essential to impress upon the jury that each defendant could be found guilty of the conspiracy charged only if that overall design was within his reasonable contemplation when he engaged in any of the isolated activities. Specifically, the jury should have been asked to decide whether a given defendant, by engaging in one or more of the apparently isolated events, was associating himself with the overall agreement charged in the indictment. *United States* v. *Borelli*, 336 F.2d 376, 385 (2d Cir. 1964), *citing Peoni*, *supra*, 100 F.2d at 403. This the trial court did not do.

Trial court did—as did the trial court in *Borelli*, *supra*—repeatedly instruct the jury that each defendant could be found guilty only if he knowingly

joined the conspiracy charged and that guilt was to be determined on an individual basis.[12] But this left

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[12] Relevant portions of the charge are as follows:

> Now I want to charge you at this time that it is your duty to give separate consideration to the charges against each of the Defendants, whether they were a corporation or an individual. Each must be passed upon by you separately. You may find all the Defendants guilty. You may find all of the Defendants not guilty or you may find some guilty and some not guilty. This depends on the facts as you find them and the inferences which you deem appropriate to draw from those charges. . . .
>
> An individual's membership in a conspiracy must be established by evidence as to his own conduct, what he, himself, knowingly said or did. . . .
>
> Now, there has been an issue raised that, even if—and it is, of course, denied there ever was a conspiracy—but it is contended that, even if one did exist, the Defendants or certain of them ceased to participate in any conspiratorial activity prior to December 27, 1968, and, therefore, cannot be found guilty, because they were not members of any conspiracy within the Statute of Limitations. . . .
>
> Now, in any trial, such as this one, with several Defendants, there is danger that a Defendant will not be judged solely upon the evidence applicable to him. In this regard, you must consider the evidence as to each Defendant separately.
>
> You have two questions to determine: First, whether there was a conspiracy to the character alleged in the indictment; and, second, if so, which of the Defendants, if any or all, were knowing participants in it. This involves an examination of the evidence, separately, with respect to each Defendant.
>
> Now, in this instance—in this case, two of the Defendants are represented by one attorney. You still must ex-

the jury—like the jury in *Borelli*—free to find that a defendant automatically associated himself with the overall conspiracy charged merely by participating in one or a few of the acts alleged to be individual elements of the grand design. In this sense, the findings of guilt may have been "all-or-none": once an overall conspiracy was found as to some defendants, all of the defendants could have been connected to the conspiracy by their involvement in one of the minor agreements allegedly part of it. The court failed to emphasize that joining a subsidiary agreement would not constitute guilt unless it was done with the intent to join the overall conspiracy. This "all-or-none" basis for determining guilt is what bothered the *Borelli* and *Peoni* courts.

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amine the evidence as to each of those independently and reach your conclusion based on that evidence independently. Each defendant has the right to have you consider the evidence from his point of view—that is, you are to consider whether or not the evidence shows him individually guilty or not, and, unless you are convinced beyond a reasonable doubt of the guilt of a Defendant, you must return a verdict of not guilty as to that individual. . . .

In addition, you would not be warranted in finding any individual Defendant guilty, unless you find a reasonable doubt that, knowing of the existence of the conspiracy, he took some action or authorized or directed the employment of one or more means and methods in furtherance of the conspiracy, as I explained to you earlier.

Thus, the trial court never explicitly told the jury that participation in one of the allegedly conspiratorial subsidiary events was insufficient, without more, to support a verdict of guilty.

The *Borelli* court described the problem:

> The view that if the evidence warrants the finding that some defendants were parties to a single agreement to sell contraband for a nine-year period, it necessarily does so as to every defendant who has conspired with them at any time for any purpose, is thus a considerable over-simplification. Rinaldo's testimony thoroughly warranted the finding of an agreement among himself, Joe and Rosario Magavero beginning in 1950 and continuing through 1959. But it does not follow, for example, that his recital of two deliveries to Tantillo in March and July, 1951, on the instructions of Locascio in one instance, and of Rosario Mogavero in the other, would justify a finding that Tantillo had thereby made himself a part of whatever narcotics enterprises Locascio, the Mogaveros and their future partners might engage in for the rest of their lives, provided only that these were uninterrupted—a theorem that would lead to the inevitable but extraordinary conclusion that Tantillo's two purchases entered him into a "partnership in criminal purposes," United States v. Kissel, 218 U.S. 601, 608, 31 S. Ct. 124, 54 L.Ed. 1168 (1910), with Castiglia, who supplied a source to and took deliveries from an altered core seven years later, and *vice versa*.

Borelli, *supra*, 336 F.2d at 384. Appellants here raise a similar concern. For example, it does not follow that appellant Brown's participation in the allegedly conspiratorial 1965 industry-wide price increase and 1966 change in credit terms—the only

actions with which any evidence connected him—means that he associated himself with an overall conspiracy to stabilize prices beginning before 1960 and lasting until 1973. Each of the other appellants was likewise connected by the evidence only to a few of the dozens of allegedly conspiratorial episodes that the Government sought to weave into one overriding agreement. Yet the jury was never told that participation in one episode, without more, was insufficient to prove association in the latter enterprise.

In view of the ambiguity surrounding the scope of any agreement joined by each of the defendants, the trial court should have given the charge they requested on this point.[13] Conspiracy is "an elastic, sprawling and pervasive offense." *Krulewitch* v. *United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring). Trial courts must take great pains

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[13] The requested charge was as follows:

> Because the gist of the offense charged is a continuing agreement to raise, fix, maintain and stabilize prices of gypsum products, *it is essential for you to determine what kind of agreement or understanding, if any, existed as to each defendant.* Each defendant is chargeable with the acts of his or its fellow defendants and alleged co-conspirators only if the acts are done in furtherance of the joint venture as he or it understood it. No defendant is to be held responsible for what some of the alleged conspirators, unknown to the rest, do beyond the reasonable intendment *of the common agreement or understanding, if any, to which you may find him or it a party.*

(Emphasis added).

to prevent the seine of a conspiracy charge from entangling a defendant only tangentially related to the agreement in question.

The Government's assertion that appellants waived any objection to the trial court's charge on this point is without merit. Defense counsel three times expressed their willingness to make a record by "particularizing" objections to each charge the trial court denied. On each occasion, the court observed that particular objections would consume too much time and that one blanket objection sufficed to make a record for all. Where the trial judge declares that he does not require further elucidation of the requests he has refused, there can be no waiver. See *Green* v. *Reading Co.*, 183 F.2d 716, 719 (3d Cir. 1950); 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 842 (1969). Hence, the lack of a specific objection to the refusal to give this specific charge does not bar appellants from raising it as error on appeal.

Contrary to the Government's claim, appellants submitted their requested charge in a timely manner. After telling counsel on June 27, 1975, what the substance of his charge would be, the trial judge invited written objections by July 2. On June 30, the court advanced that deadline one day, so that he could rule on the objections before closing arguments began. On July 1, appellants filed numerous objections and supplemental requests designed to meet the court's previous comments. Among them was the charge at issue here. Because of time constraints, the trial court did not then rule on the lengthy submissions.

He indicated, however, that he would refer to them in formulating his charge.[14] Because the court acknowledged on the record that appellants had timely called his attention to the points they wanted charged, the Government's assertion of waiver must fail.

C.

Appellants also question the sufficiency of the trial court's charge with respect to withdrawal from the alleged conspiracy. Where a continuing conspiracy is proven, each defendant who by affirmative action has completely dissociated himself from the agreement before the start of the limitations period is entitled to acquittal. *Hyde* v. *United States*, 225 U.S. 347, 369 (1911). This abandonment may be effected by communicating it "in a manner reasonably calculated to reach co-conspirators." *Borelli*, *supra*, 336 F.2d at 388. Proof of such communication need not involve evidence that the defendant directly informed each co-conspirator of his intent to withdraw.

> The formation of a criminal conspiracy or adherence to a criminal scheme may be shown by

[14] The trial court's comments were as follows:

> I will use them only for the purpose of my own guidance in my final charge, but they are just too late for me to pass on them as a supplemental request for charge, *as for guidance of counsel*. . . .

(Emphasis added).

The lateness the court mentions relates not to the submissions in general, but to the court's ability to rule on them *that day* so that counsel would be aware of the court's intent when making their closing arguments.

> evidence either direct or circumstantial, in practice often taking a wide range, and we see no reason why the withdrawal should not be held susceptible to proof of the same character. It might, of course, be shown by a writing, or by an express oral agreement, and we think by conduct wholly inconsistent with the theory of continuing adherence.

Buhler v. *United States*, 33 F.2d 382, 384 (9th Cir. 1929); *accord*, *Marino* v. *United States*, 91 F.2d 691, 698 (9th Cir. 1937), *cert. denied sub nom. Gullo* v. *United States*, 302 U.S. 764 (1938). *See also United States* v. *Goldberg*, 401 F.2d 644, 648-49 (2d Cir. 1968), *cert. denied*, 393 U.S. 1099 (separate appeal), *cert. denied sub nom. Tannenbaum* v. *United States*, 394 U.S. 932 (1969) (separate appeal); *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 958 (1959).

Appellants introduced evidence of the resurgence of price competition, and other forms of competition, which could have convinced the jury that one or more of the defendants had abandoned any conspiracy to stabilize prices and other conditions before the start of the limitations period. They also requested a charge to the effect that active competition on price might amount to the "affirmative action" necessary to accomplish a withdrawal.[15] Trial court's

[15] The requested charge was as follows:

> Even if you find the existence of a conspiracy formed before December 27, 1968 and continuing thereafter you

charge, however, negated this theory of withdrawal. The court charged as follows:

> In order to find that a defendant abandoned or withdrew from a conspiracy prior to December 27, 1968, you must find from the evidence, that he or it took some affirmative action to disavow or defeat its purpose. Mere inaction would not be enough to demonstrate abandonment. *To withdraw, a defendant either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials.*

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must acquit any defendant if it appears that he withdrew from such a conspiracy prior to the December 27, 1968 date. To withdraw from a conspiracy, a conspirator must take affirmative action. Resumption of competitive behavior, such as intensified price cutting or price wars, *could* constitute such affirmative action. If there is a reasonable doubt as to whether a defendant has withdrawn from the conspiracy charged, if any existed, prior to December 27, 1968, that defendant must be acquitted.

(Emphasis added).

This charge would not have told the jury "that merely the fact that somebody was in competition shows withdrawal from conspiracy," as the trial court feared; instead, it merely recognized appellants' right to have the jury apply their theory of withdrawal if the jury believed their evidence and drew the inferences they asked the jury to draw. While not a model charge on this point, it at least drew the court's attention to the improperly narrow scope of the charge actually given.

> Thus, once a defendant is shown to have joined a conspiracy, in order for you to find he abandoned the conspiracy, the evidence must show that the defendant took some definite, decisive step, indicating a complete disassociation from the unlawful enterprise.

(Emphasis added).

As the court explained the meaning of "withdraw," it comprised only affirmative notification—which connotes direct announcement—and disclosure to law enforcement authorities. Either might constitute withdrawal, but the court, by limiting withdrawal to these two, improperly excluded other possibilities, such as conduct inconsistent with the theory of continued adherence.

The court did permit appellants to argue their theory of withdrawal to the jury. That opportunity did not salvage appellants' rights, however, because the court in its subsequent charge told the jury that they could not consider appellants' theory. Reversal is, in my opinion, required on this point.[16]

IV.

The judgments of conviction will be reversed and the case remanded to the court below.

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[16] Neither Judge Adams nor Judge Weis agrees with this conclusion.

ADAMS, *Circuit Judge*, concurring.

While I concur in the reversal of the defendants' convictions, I am impelled to comment on one issue that Judge Hunter has not discussed. That issue is whether the trial judge, in effect, directed the jury to reach definitive verdicts of guilty or not guilty. A determination that the verdicts were so induced would, of course, reinforce the conclusion reached by Judge Hunter.

I.

After a nineteen week trial, the jury began its deliberations in the afternoon of Tuesday, July 8, 1975. On each of the next two days (Wednesday and Thursday), the jury deliberated from 9:00 a.m. until 10:00 p.m.

On Friday, July 11, the fourth day of sequestered deliberations, the trial court advised counsel that "[s]ome of the jurors aren't feeling well" and that "[s]ome are tired."[1] The judge suggested a weekend cessation in the deliberations to reduce the "strain" on the jury, but the defense counsel objected. The district court then summoned the jury foreman who, in the presence of counsel, reported that some jurors were "crying" and that others were concerned about being "away from home for a long time."[2] However, the foreman also stated that the deliberations were "going as well as can be expected."[3] As a result of this report, the trial court decided that deliberations would terminate each day at 6:30 p.m. instead of 10:00 p.m.

[1] Transcript at 15,128.

[2] *Id.* at 15,135.

On Saturday, July 12, the judge, in open court, ordered the jurors to continue their deliberations. He did so, using the supplemental instruction previously approved by this Court in *United States* v. *Fioravanti*.[4]

Late on Sunday, the sixth day of deliberations, the jury notified the court that it could not reach a verdict. A note addressed to the judge declared: "We cannot reach a unanimous verdict. If any juror changes his mind now, he would only change due to

[3] *Id.* at 15,136.

[4] 412 F.2d 407 (3d Cir.), *cert. denied sub nom.*, Panaccione v. United States, 396 U.S. 837 (1969).

Basically, the *Fioravanti* charge outlines the responsibilities of each juror during deliberations, including the duties to reexamine one's own predilections and to deliberate with a view towards reaching a verdict, if possible. For the text of the recommended instruction, see 412 F.2d at 420.

In this Circuit at least, the *Fiorarvanti* charge supersedes a supplemental instruction approved in Allen v. United States, 164 U.S. 492 (1896). In essence, the *Allen* charge cautioned the minority within a jury to "see the error of its ways." 412 F.2d at 417. Caustically denominated as the "dynamite" charge (*see* Green v. United States, 309 F.2d 852, 853 (5th Cir. 1962)), the *Allen* instruction had been criticized by eminent scholars and jurists as having an inherently coercive influence on jury deliberations. Consequently, this Court suggested the more neutral statement of juror responsibilities embodied in the *Fioravanti* instruction.

compassion for his fellow jurors."[5] In response to this note, the judge assembled the jury and, in the presence of counsel, again gave the *Fioravanti* charge. When the jury retired, the judge informed counsel that he would not quickly declare a mistrial after a nineteen week trial.

On Monday, July 14, the seventh day of deliberations, the court received another note from the jury. This message stated that the foreman wished to "discuss the condition of the jury" and to "seek further guidance" from the judge.[6] The trial judge informed counsel that he would confer privately with the foreman (with a court reporter present) and would impound the transcript of the conference. He went on to say, however, that if the parties objected, the foreman's request for a meeting would be denied. When the parties did not object to the proposed conference, though defense counsel did express serious reservations,[7] the judge spoke with the foreman in a room adjacent to the court. The transcript of the discussions then was impounded, despite renewed and repeated requests for it.[8] Indeed, it was not until this Court ordered its disclosure, pursuant to a post-trial motion by defendants, that they learned what the transcript contained.[9]

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[5] Docket entry 322, ¤24.

[6] Transcript at 15,164.

[7] *Id.* at 15,165-71.

[8] *Id.* at 15,174-75.

[9] Order of the Court of Appeals for the Third Circuit, dated September 16, 1975.

During the meeting between the judge and the foreman, the foreman initially reported on the health of the jury. He represented that the jurors were "distraught" and "sick," with "at least eight of the jurors . . . taking some kind of pill."[10] The foreman next stated that "personality conflicts on the jury" had impeded their discussions, but that the jurors "have overcome those [conflicts]."[11] Finally, the foreman declared that, in his opinion," the jury was deadlocked: "We have taken enough ballots now, and we have had enough discussions, and the way it is divided is not going to be settled by any document, any remembrance of testimony."[12] When the trial judge inquired whether the "jury is hopelessly deadlocked and will never reach a verdict," the foreman responded in the affirmative.[13]

At the end of the conference, the following critical exchange occurred:

> Mr. Russell [foreman]: * * * It is a situation I don't know how to help you get what you are after.
>
> The Court: Oh, I am not after anything.
>
> Mr. Russell: *You are after a verdict one way or the other.*

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[10] Conference Transcript at 2.

[11] *Id.* at 4.

[12] *Id.* at 4.

[13] *Id.* at 6.

The Court: *Which way it goes doesn't make any difference to me.*[14]

The trial judge then instructed the foreman to "tell [the jury] to keep deliberating and see if they can come to a verdict." [15]

Upon returning to the courtroom, the judge purported to summarize for counsel what had transpired during the conference. The judge first stated that "because of what [the foreman] calls personality differences between some members of the jury . . . he does not feel that they are ever going to be able to get over this." Thereafter, the court advised counsel that some of the jurors were "not feeling well," but that the foreman really did not "know if they are sick or aren't sick." The judge then announced that he had relayed a message to the jurors "to continue their deliberations."

Significandly, the judge did not tell counsel about the foreman's opinion that the jury was hopelessly deadlocked; did not indicate that the foreman was under the impression that the court wanted a definitive verdict either for the prosecution or the defendants; and did not mention the directive to the jury that it should "see if [it] can come to a verdict." Thus, it does not appear that the report on the substance of the discussions between the court and the

[14] *Id.* at 7. (emphasis added)

[15] *Id.* at 8.

foreman was accurate or even substantially accurate.[16]

In any event, on the following morning, the eighth day of deliberations, the jury returned guilty verdicts against each of the defendants.

II.

Defendants contend that the trial court "coerced" a deadlocked jury into reaching its verdict. They maintain that the judge caused the jurors to deliberate at excessive lengths and despite illness and exhaustion. The defendants also argue that the repetition of even an approved supplemental charge inherently compelled a verdict. Finally, they assert that the district court impermissibly insisted upon a verdict, foreclosing the possibility of a hung jury. Since I believe that only the last claim—that the verdict was improperly induced—is valid, I shall confine my discussion to that proposition.

The factual linchpin of the defendant's contention that the court, in effect, "coerced" a verdict from the jury is the private conference between the foreman

[16] In his dissenting opinion, Judge Weis appears to emphasize the fact that, after the trial court's report to counsel, one of the defense lawyers "suggested that the appropriate point [for declaration of a mistrial] would be the following morning [Tuesday, July 15]. . . ." However, it is reasonable to assume that, had this attorney known of the extent of the jury deadlock or that the court had in no way dispelled the foreman's belief that the court wanted a definitive verdict "one way or the other," he would have demanded an immediate mistrial.

and the trial judge. There, as noted above, the foreman declared that he knew the court wanted a verdict "one way or the other." At that point, I believe, the trial judge possessed the affirmative obligation to make it clear to the foreman that the jury had the option of reaching no verdict, should juror unanimity prove impossible. Instead, by stating merely "which way it goes doesn't make any difference to me," there was effectively conveyed to the jury, through the medium of the foreman, the directive that only a verdict for the prosecution or a verdict for the defendants would be acceptable to the court. Such an admonition provides justification, in my view, for overturning the defendants' convictions.

Reversal on this ground would appear to be required by prior teachings of the Supreme Court as well as this Court. In a per curiam opinion in Jenkins v. United States,[17] the Supreme Court deemed as coercive a trial court's instruction to a jury that "You have got to reach a decision in this case." While the counterpart in the present case was more subtle in nature, it does not appear to differ materially from the instruction proscribed in *Jenkins*. Nor is it any less coercive.[18]

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[17] 380 U.S. 445 (1965).

[18] *Jenkins* does differ somewhat from the case at bar, as there the defective charge was given only two hours after the inception of jury deliberations. However, the variance in timing between that case and ours would not appear to be significant. In both situations, the judge made it known to the jurors that he wanted a definitive verdict, a request that soon after was rewarded. In *Jenkins*, such a procedure was deemed to be reversible error.

This Court previously has provided a cogent delineation of the relevant principles governing judge-jury relations during the deliberative period. In *Fioravanti*,[19] we made it very clear that jurors should not return a verdict unless they have reached complete unanimity concerning the guilt or innocence of a defendant.

Speaking for a unanimous panel, Judge Aldisert posited:

> So long as the unanimous verdict is required in criminal cases, there will always be *three* possible decisions of the jury: (1) not guilty of any charge; (2) guilty of one or more counts of the indictment; and (3) *no verdict* because of a lack of unanimity. The possibility of a hung jury is as much a part of our jury unanimity schema as are verdicts of guilty or not guilty. • • • [I]t is a cardinal principle of the law that a *trial judge may not coerce a jury to the extent of demanding that they return a verdict.*[20]

In our system of criminal justice, then, a jury need not, and may not, render a verdict if it is unable to attain agreement. To permit a trial judge to undermine a jury's prerogative of not returning a verdict would abrogate the protection that the right to a

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[19] 412 F.2d 407.

[20] 412 F.2d at 416. (emphasis added)

jury accords criminal defendants. Moreover, if jurors are encouraged to subscribe to verdicts to which they are not committed, merely to reach some definitive result upon judicial insistence, then the universal perception of jury verdicts as manifestations of reasoned agreement would have to be examined anew. Such reevaluation is unnecessary so long as we thwart efforts to preclude one bona fide outcome of jury deliberations—no verdict.

None of this is to suggest that jurors should not be encouraged to reach a verdict, if unanimity is at all possible, or that the discretion of trial judges over declarations of mistrial should be restricted. Yet where a trial judge, in effect, eliminates the possibility of no verdict through comments to the jury, the validity of verdicts rendered by that jury should be called into question.

In the present case, it is evident that the jury had the mistaken impression, for whatever reason, that it must reach a verdict of guilty or not guilty. Yet, that impression was in no way dissipated by the trial court in its conference with the foreman, or at any time thereafter.[21] Indeed, the court's language

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[21] While the district judge had assured counsel that he would give no instructions on the law during the conference, nor repeat the *Fioravanti* charge, in my view, the judge should have attempted to remedy the foreman's belief that only verdicts of guilty or acquittal were acceptable. If the judge felt constrained not to provide any legal instructions during the conference, because of the assurances afforded counsel, he could have summoned the jury and, in the presence of counsel, informed the jurors that no verdict was appropriate and, indeed, necessary should they be unable to reach unanimity. Here, however, the court failed to take any such steps.

seems to have confirmed the impression that a verdict of guilty or not guilty was required. This is especially so because the critical dialogue between the trial judge and the foreman occurred immediately after the court learned that the jury was so "hopelessly deadlocked" that the case was "not going to be settled by any document, any remembrance of testimony." In effect, the trial judge at that point took from the jurors their prerogative to render no verdict, should it have appeared to them, as the colloquy with the foreman so indicates, that unanimity was not attainable. Such encroachment on jury authority, and the concomitant proscription of a possible "no verdict" outcome, requires reversal of the defendants' convictions.

In my judgment, the jury issue present here warrants reversal, and such a conclusion buttresses the result reached by Judge Hunter.

III.

Having decided that the defendants' convictions must be reversed because of the jury question, I will comment but briefly on the matters considered by Judge Hunter.

I concur in Parts I, II and IIIA of Judge Hunter's opinion. As to Part IIIA, I do so, recognizing that the exception to Sherman Act liability that the § 2(b) proviso of the Robinson-Patman Act creates is a nar-

row one. Sellers in prosecutions for verification activities face the difficult task of convincing the jury or the court, as the case may be, that such activities do not constitute price-fixing but reflect a "controlling circumstance" beyond their power (*e.g.*, the "lying buyer").[22]

With respect to the "conspiracy" and "withdrawal" issues,[23] it is questionable whether the charge of the trial judge constituted reversible error. This is particularly so given the length of the trial and the unusually complex legal questions present in this litigation. Within the context of the complete charge and of the trial as a whole, the instructions as to these two issues would appear to be adequate. Even so, as the case must be retried, the district court could do well to incorporate in its charge, on remand, the suggestions set forth by Judge Hunter.

WEIS, *Circuit Judge*, dissenting.

A.

The majority opinion discusses the conflict between the Sherman and Robinson-Patman Acts and the resulting dilemma that a business concern may face in steering between this Seylla and Charybdis of commerce. However, the course chartered by the

[22] 393 U.S. 333, 335 (1969).

[23] See Parts IIIB and C of Judge Hunter's opinion.

majority to avoid these two hazards, while carefully considered, does not clear the shoals of *United States* v. *Container Corporation of America*, 393 U.S. 333 (1969).

The trial judge charged the jurors that, standing alone, verification to comply with Robinson-Patman did not violate the Sherman Act; such activity, however, could be evidence of an illegal agreement despite a proper purpose if stabilization of prices resulted. The majority hold that this instruction was erroneous. They read *Container Corporation* to allow an exchange of information with competitors in oligopolistic markets where:

1. the motive of the seller is compliance with Robinson-Patman;
2. he doubts the truthfulness of a buyer's report that lower offers by competitors have been made; and
3. the seller is unable to obtain independent corroboration of the buyer's representation.

This combination of factors is characterized as a "controlling circumstance." In the interest of brevity, it may be termed the "lying buyer" defense.

There are serious difficulties with this interpretation when the facts of the *Container* case are examined. The pertinent details in the case are not elaborated in the Supreme Court's opinion but must be gleaned from the extensive findings and opinion of the district court.[1] The trial judge determined that:

[1] The case is reported at 273 F. Supp. 48 (M.D. N.C. 1967).

1. buyers furnished inaccurate, incomplete or misleading information on prices;
2. no defendant furnished a competitor his most recent price, except in response to a specific request;
3. verification was requested only when buyers were suspected of furnishing inaccurate information;
4. there was no agreement to exchange price data;
5. the information was not disseminated to the public or to customers generally; and
6. there was no proof that the exchange of data had the effect of stabilizing prices.

The district court concluded that the defendant's conduct was designed to "prevent the perpetration of a fraud upon them," and thus was insulated by *Cement Manufacturers Protective Association* v. *United States*, 268 U.S. 588 (1925). Although the district court did not discuss the Robinson-Patman issue, it was briefed by the parties on appeal to the Supreme Court.

The factual background of *Container* is strikingly similar to that of the case *sub judice*, except that these defendants do not deny the existence of an agreement to verify and the jury verdict establishes the fact of effect upon prices. These factors weigh the scales even more heavily on the side of the government. The buyers' behavior in the gypsum industry cannot be classified as a "controlling circumstance" exempting the agreement from the proscription of *Container* if in that case the Court condemned that very circumstance.

The defendants here have been found guilty of price fixing, and it is now well settled that such conduct is illegal even if the motives which inspire it are beneficent or altruistic, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). In essence, the defendants contend that if price stabilization did occur as a result of their efforts to prepare a Robinson-Patman defense, then such an effect is only incidental and not prohibited. But Robinson-Patman does not mandate price verification with competitors in oligopolistic markets. Our opinion in *Viviano Macaroni Co.* v. *FTC*, 411 F.2d 255 (3d Cir. 1969), does not go so far but requires only a reasonable inquiry into a buyer's veracity. That case does not compel an investigation which itself is illegal either because it results in price fixing or violates other provisions of law.

If the Robinson-Patman Act requires verification, even that which tends to stabilize prices, it is difficult to understand why the defendants' "purpose" to comply would be significant. Observance of a statutory requirement is legal whether or not the actor has knowledge of it. Thus, it may be seen that the defendants' use of "purpose" is to make it interchangeable with "motive." As *Socony-Vacuum*, *supra*, makes clear, that factor does not absolve those responsible for the forbidden anti-competitive effect.

See Maple Flooring Manufacturers Assn. v. *United States*, 268 U.S. 563, 577, 585 (1925).

I do not understand *Container* to expand the holding of *Cement Manufacturers*, but rather to confine it. The Supreme Court did not attempt to distinguish *Cement* in detail but there is a difference between that fact situation where a seller was bound by an existing contract to furnish material and that which obtains here where he is free to enter into a transaction or not as he chooses. *Container* was based on the premise that information exchanges in a restrictive market have the actual or theoretical effect of stabilizing prices and generally should not be tolerated, 393 U.S. at 337. In the oligopolistic setting, the control of price information by the seller reinforces his economic power in a manner inconsistent with the play of free market forces. This theory led the Supreme Court to reject the proposition that an exception should be made when the exchange of price information in a response to the "lying buyer," though obviously the opinion did not condone the purchaser's tactics.

I agree with the majority that *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), and *Gray* v. *Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973), do not fit within *Container*. Moreover, in my view *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971), does not follow the Supreme Court's opinion.

The trial judge in the case *sub judice* obviously grasped the significance of *Container* when he charged:

> "[I]f . . . the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these [ex]changes as evidence of the mutual agreement . . . to raise, fix . . . and stabilize list prices."

I believe that in the circumstances of this case, the instruction was correct, properly presented the issue to the jury,[2] and, hence, did not constitute reversible error.

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[2] In Handler, Antitrust: 1969, 55 CORNELL L. REV. 161, 176 (1970), Professor Handler writes: "A compact to exchange price information plainly should be unlawful without more if its *purpose or effect* was to stabilize prices." He observed that in *Container Corporation* defendants had stressed Robinson-Patman as well as fraudulent conduct of the buyers as a defense, but Justice Douglas, author of the majority opinion, "rejected these assertions out of hand."

In Kefauver, The Legality of Dissemination of Market Data by Trade Associations: What does *Container* Hold?, 57 CORNELL L. REV. 777, 788 (1972), the author states: "The majority in *Container* of course found an *effect* of price stabilization, but nothing in the opinion indicated that they had found a *purpose* on the part of defendants to achieve such an effect." "*Container* placed a new emphasis on the *effect* of competitors' exchange of market information." *Id.* at 791. Professor Handler noted that a contrary result would promote evasion. *Cf.* Eaton, The Robinson-Patman Act: Reconciling the Meeting Competition Defense with the Sherman Act, 18 Antitrust Bull. 411, 427 (1973). ("There is however

B.

The testimony in this case took more than four months and generated a transcript of many thousand pages. After all the evidence had been received, the trial judge's task was to instruct the jury on complex issues of law in the antitrust, conspiracy and general criminal fields. Such a charge must be phrased in language intelligible to a lay audience and, while conveying the substance of the law, must be sufficiently succinct that the jury is not overwhelmed. Too often we on the appellate courts scrutinize jury instructions for adherence to the esoteric standards expected of a law review article. We tend to forget that the charge should be as simple as possible and contain no more than the jury needs to apply law to facts in reaching a verdict.

Judge Hunter's opinion faults the trial judge for failing to give the instruction requested by the defendants which is set out in full at footnote 12. In essence, this point for charge required the jury to determine what kind of agreement or understanding existed as to each defendant. It went on to say that no defendant was to be held responsible for what another conspirator might have done beyond the common agreement or understanding. I assume that the

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a great potential for abuse in any 'lying buyer' defense. Its applicability may therefore be somewhat limited.")

A deliberate scheme to fix prices is, of course, illegal, even if unsuccessful, and in such a case the "purpose" of the defendants would be relevant to establish intent.

refusal of the trial judge to charge in the precise verbiage requested is not at issue, *see James* v. *Continental Insurance Co.*, 424 F.2d 1064 (3d Cir. 1970). Rather, the error claimed is the omission of an instruction to the effect that a particular defendant could be found guilty of conspiracy only if he understood that he had joined the single overall agreement charged in the indictment. As I read it, the charge adequately set forth the spirit of the instruction that Judge Hunter desires. The portions of the charge quoted in footnote 11 of his opinion demonstrate that the jury was told each defendant's membership in the conspiracy was to be evaluated on an individual basis.

Early in the charge, the trial judge reviewed the indictment which listed allegations of some thirteen manners and means used to implement the price-fixing conspiracy. He later said:

> "Before the jury may find that a defendant or any other person has become a member of a conspiracy, evidence in the case must show, beyond a reasonable doubt, that the conspiracy was knowingly formed and that the defendant or other person who is claimed to have been a member knowingly participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy . . . . [S]o, if a defendant or any other person, understanding the unlawful character of a plan, intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he,

therefore, becomes a knowing participant, a conspirator.

* * * *

"If it appears beyond a reasonable doubt, from the evidence in the case, that the conspiracy alleged in the indictment was knowingly formed and that any Defendant knowingly became a member of the conspiracy, either at the inception of the plan or scheme or afterward, then the success or failure of the conspiracy to accomplish the common purpose or object is immaterial.

* * * *

"In considering whether there was a conspiracy, you should bear in mind that a conspiracy does not have to be completely formed at one place or at one time. It can be put together a little at a time and can be joined at different times or in different ways by each alleged conspirator.

* * * *

"Now, there are two essential elements which must be proved in order to establish the offense of conspiracy as charged in this indictment:

"First, that the conspiracy described in the indictment was knowingly formed and was existing at or about the time alleged; and,

"Second, that the Defendants *knowingly* became members of the *conspiracy as charged.*

"If the jury should find—you, the jury, should find, beyond a reasonable doubt, from the evidence in the case, that existence of the conspiracy charged in the indictment has been proved, then the conspiracy offense charged is complete,

and it is complete as to every person found by the jury to have been *knowingly* a member of the conspiracy, regardless of whether such a person *knowingly became a member at its inception or the beginning of the conspiracy or afterward, during the continuance of the conspiracy.*

* * * *

"You have two questions to determine: First, whether there was a conspiracy of the character alleged in the indictment; and, second, if so, which of the Defendants, if any or all, were *knowing* participants in it. This involves an examination of the evidence, separately, with respect to each Defendant.

* * * *

"In addition, you would not be warranted in finding any individual Defendant guilty, unless you find beyond a reasonable doubt that, knowing of the existence of the conspiracy, he took some action or authorized or directed the employment of one or more means and methods in furtherance of the conspiracy, as I explained to you earlier." (Emphasis supplied)[3]

The jury was not left in doubt that it was to analyze the evidence of each defendant's participation and return a guilty verdict only if convinced of his participation in the price-fixing scheme charged in the indictment. Moreover, just as a challenged sen-

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[3] These instructions were taken in large part from 1 E. DEVITT and C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, Chapter 23, ANTITRUST-CONSPIRACY-CONTRACT IN RESTRAINT OF TRADE (2d ed. 1970).

tence or paragraph should be viewed in the context of the complete charge, so should the instructions be considered in the perspective of the trial as a whole. *Cupp* v. *Naughten*, 414 U.S. 141 (1973). After able and vigorous defense counsel had spent many hours arguing their respective clients' innocence and emphasizing the evidentiary matters favorable to them, it is unrealistic to believe that the lack of a semantical refinement in a lengthy and otherwise adequate charge had any effect whatsoever on the verdict. In my view, the charge as given was not erroneous but, even assuming it were deficient to some extent, reversal would not be warranted.

C.

Similarly, I do not agree that the charge on withdrawal from the conspiracy constitutes grounds for reversal. Judge Hunter's view is that the instructions improperly excluded the possibility of proving withdrawal by evidence of conduct inconsistent with adherence. Moreover, Judge Hunter asserts that the trial judge told the jurors they could not consider the defendants' theory to that effect. But the charge clearly and accurately stated that withdrawal could be found from evidence showing a defendant "took some affirmative action to disavow or defeat the purpose of the conspiracy." The court also stated that a defendant must have notified other members of the conspiracy or made disclosure to law enforcement officials. The trial judge concluded this phase of the charge by saying:

> "Thus, once a defendant is shown to have joined a conspiracy, in order for you to find he abandoned the conspiracy, the evidence must show that the defendant took some definite, decisive step, indicating a complete disassociation from the unlawful enterprise."

The phrase "some definite, decisive step" was taken from our opinion in *United States* v. *Chester*, 407 F.2d 53, 55 (3rd Cir.), *cert. denied*, 394 U.S. 1020 (1969), and is a correct statement of the law.

If the defendants understood the charge as limiting the evidence of withdrawal to notification, it was counsel's duty to request a correction. After the charge, defense counsel stated to the court:

> "Your Honor in referring to the subject of determination of abandonment of conspiracy named only two precise alternatives and failed to point out that resumption of competitive behavior such as intensified price cutting or price wars could constitute such aggressive action as to terminate conspiracy.
>
> THE COURT: I purposely left that out, as I do not think it is a correct statement of the law."

This colloquy must be understood in light of the discussion which occurred before the charge. Defendants had submitted a request for charge that "resumption of competitive behavior, such as intensified price cutting or price wars, could constitute such affirmative action. . . ." At a conference held before the summations, the following dialogue took place:

[DEFENSE COUNSEL]: "Your Honor, may I inquire that you would give the part which says 'Resumption of competitive behavior,' such as intensified price cutting, or . . .

THE COURT: No, I will not give that. I think that's an improper statement of the law. I am not going to say that.

Competitive behavior may or may not be inconsistent with a conspiracy to fix prices, and it is just as arguable that when prices are low there is a conspiracy to try to get them up and try to get some profits, as there is the other way.

And, furthermore, there is a logical argument here that there are people that were not in the club—as Mr. Fricano put it—not in the conspiracy that caused intensified competition.

So, I am not going to charge that. That's for the jury to determine.

[DEFENSE COUNSEL]: Do I understand that Your Honor is going to charge that there has to be direct evidence of withdrawal?

THE COURT: No, I didn't say that at all.

[DEFENSE COUNSEL]: I mean the point that we are talking about would indicate evidence from which it seems to me the inference would be drawn of withdrawal.

THE COURT: You can argue that to the jury, but I am not going to tell the jury that merely the fact that somebody was in competition shows withdrawal from a conspiracy. I don't think that's good law.

[DEFENSE COUNSEL]: I just want to be sure that you are [sic] going to say there had to be direct evidence of withdrawal.

THE COURT: There are numerous points here that you gentlemen have asked for direct evidence. I am not going to charge that in any instance that there must be direct evidence. There can always be evidence by conduct from which you can imply something."

Thus, defense counsel were advised in advance that the court would make only a general statement of the law and would not adopt their application of the facts, although counsel would be free to argue their factual proposition to the jury. The defense did not object to the charge because it limited evidence of withdrawal to affirmative notification, but rather because the judge refused to weave in the defense interpretation of the evidence. However, the jurors were free to consider that the alleged competitive activity was a definite, decisive step indicating a complete disassociation from the unlawful enterprise. The verdict indicates they rejected that theory. I cannot justify a new trial on the basis of this asserted deficiency in the charge.

D.

The concurring opinion finds reversible error in the trial judge's comments to the jury foreman and in the failure to declare a mistrial because the jury was deadlocked. I am unable to agree.

In fairness to the trial judge, it must be emphasized that he spoke to the foreman only after receiv-

ing the unequivocal assent of the individual defendants and counsel, and indeed at the latter's urging. Defense counsel voiced some misgivings when the judge advised that he would impound the transcript "for review by some other court if that should ever become necessary," but the judge then stated that he would convey to counsel the import of his conversation with the foreman insofar as it did not reflect the thinking of the jurors. Moreover, the judge was explicit in stating that the transcript would not be available to counsel except on appeal, and he would not meet with the foreman if that provision was unacceptable. This condition precedent could not have been misunderstood by counsel.

After the conference with the foreman ended, the judge met with the lawyers and relayed the substance of the jurors' comments. Defense counsel then moved for a mistrial:

> "[O]n the basis that it appears from what we know, from what Your Honor has told us, and our observations, that the jury is deadlocked and it appears unlikely that they would be able to reach a unanimous verdict, apparently even with respect to the individual Defendant parties, and therefore there is the danger of the coerced verdict." [4]

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[4] In view of the tenor of the motion, I see no significance in the fact that the trial judge did not report the foreman's belief that the jury was deadlocked. Indeed, the defense lawyers had moved for a mistrial on the previous day because of an allegedly hung jury.

The trial judge did not deny the motion, but deferred ruling, saying: "I am not going to discharge the jury yet . . . . I would like a view as to how much longer I should let them deliberate before I . . . declare a mistrial . . . ." One defense lawyer suggested that the appropriate point would be the following morning but another disagreed, stating that the deliberations had gone far enough. The judge responded that he would allow the jury to continue until Friday, and at that time would rule on the motion. Since the verdicts were returned on Tuesday, the following morning, the motion became moot.

On the preceding Friday, July 11, the fourth day of deliberation, the judge advised counsel that some jurors were not feeling well and others were tired. He listed a number of alternatives which might alleviate the jurors' discomfort, including the option of sending them home for the weekend. When the defense objected, the judge acquiesced, although he recalled that this court had approved the practice of allowing jurors in a criminal case to return to their homes during deliberations. *See United States* v. *Piancone*, 506 F.2d 748 (3d Cir. 1974). In an effort to ease the jurors' task, the hours of deliberation were shortened but the sequestration continued.

The concurring opinion contends the jury had the mistaken impression that it was required to reach a verdict of guilty or not guilty. But at no time did the trial judge so charge or otherwise suggest this to the jury. Indeed, he was well aware that such an

instruction would be error. After the *Fioravanti* charge was given on Sunday, the sixth day of deliberation, the judge and counsel had the following conversation:

> [DEFENSE COUNSEL]: "That has occurred after Your Honor had on two prior occasions given the charge, first of all in your original charge, then again yesterday afternoon advising them as to their obligation to reach a verdict.
>
> • • • •
>
> THE COURT: I would only point out that I did not charge them as to their obligation to reach a verdict.
>
> • • • •
>
> I at no time said they had a duty to reach a verdict. I said they had a duty to deliberate toward reaching a verdict. I think that would be error, and I did not do that.
>
> [DEFENSE COUNSEL]: I didn't mean to indicate you used those words. I used that as a short-hand way of referring to the charge Your Honor had given and I believe in all these instances it was similar to the Third Circuit charge . . . ."

In concluding his remarks to the jury foreman on Monday, the judge said:

> "You tell them to keep deliberating and *see if they can come to a verdict.*" (Emphasis supplied)

I do not read this as a direction to reach a verdict, but rather that the jury should attempt to reach a

verdict. This was a perfectly proper admonition. Plainly the judge did not rule out the possibility that the jury could not come to a verdict since the language of his remark was conditional.

In my view it would not have been proper for the judge to have told the foreman at the private conference that the jury had the option of reaching no verdict. The judge had assured counsel in advance that he would give no instruction on the law during the conference and, indeed, the defense lawyers were most anxious that there be no repetition of the *Fioravanti* charge. It is also highly unlikely that thereafter defense counsel would have asked the court to tell the jury about its privilege to return no verdict. For some time before the conference, all the lawyers were aware that the possibility of a true deadlock existed, but no request for additional charge along that line had been made. Moreover, I would doubt that such an instruction should be given. Experience demonstrates that juries should be encouraged to reach verdicts and should not be proffered an "easy way out" by a judicial suggestion that a deadlock is an equally satisfactory alternative. It is the duty of the trial judge to determine when the jury has "hung," and then declare a mistrial. This procedure adequately protects the right of the parties to a "no verdict" trial.[5]

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[5] The problem engendered by a charge to the jury advising of its right to return "no verdict" is similar to that in which a criminal jury would be told that it may disregard the charge and acquit the defendant in spite of the law. While a jury

The reasoning of *Jenkins* v. *United States*, 380 U.S. 445 (1965), is not pertinent here. In that case, after only two hours of deliberation, the trial judge stated to the jury in part, "You have got to reach a decision in this case." *Id.* at 446. The Solicitor General's brief referred to the principle that jurors may not be coerced into surrendering views conscientiously held. *Fioravanti* also refers to that principle, and the trial judge here cautioned the jury in that vein on several occasions. *United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969). The record does not support the assertion that he impermissibly insisted on a verdict.

The decision to declare a mistrial must in large measure be entrusted to the discretion of the trial judge. He is "on the scene" and is in a position to make an informed judgment on the physical and emotional conditions of the jurors, the difficulties involved in the issues submitted to them, and the likelihood that a verdict will be reached. No record can convey all the imponderable factors to an appellate court, nor does its experience better qualify it in any but the exceptional case to second-guess the trial judge. The fact that the foreman thought no verdict could be reached is not conclusive upon us or the trial

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does have such a right, the wisdom of such an instruction has been vigorously debated. *See* the opinion of Judge Sobeloff in United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970). *Cf.* United States v. Alper, 449 F.2d 1223, 1233 (3d Cir. 1971), *cert. denied*, 405 U.S. 988 (1972).

judge. It is not uncommon that a verdict is returned after a jury has sincerely thought it was deadlocked. The foreman was not endowed with the experience of the trial judge, and it is understandable that with so many complex issues to be resolved, he became discouraged during the deliberations.[6]

This was a lengthy and vigorously contested case, where the factual issues were close and the mass of exhibits formidable. It would seem inconceivable that any reasoned, responsible verdict could have been reached without extended deliberations. Moreover, the expenditure of time, resources and effort on the part of all concerned obligated the trial judge to exert his best efforts to secure a verdict if one could be reached without injustice or coercion. I am convinced that he properly exercised his discretion. The defendants' contention to the contrary rings somewhat hollow in my ears, particularly in view of their objection to permitting the jurors to return home during the deliberations, at least over the weekend.[7]

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[6] After the jury returned its verdicts, it was polled several times and each juror unequivocally confirmed the findings of guilt.

[7] It is difficult to understand the defense reluctance about allowing the jurors to return home since they had done so each evening during the months when testimony was being received. If there had been danger of damaging publicity or improper approaches to the jury, it would not have sprung into existence simply because deliberations had begun.

It has often been said that there are no perfect trials, and the best that our system can provide is a fair one. I believe that criterion was met here and, accordingly, I would affirm.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for
the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 75-1836/75-1842

UNITED STATES OF AMERICA

vs.

UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, GEORGIA-PACIFIC CORPORATION, KAISER GYPSUM COMPANY, INC., THE CELOTEX CORPORATION, THE FLINTKOTE COMPANY, GRAHAM J. MORGAN, ANDREW J. WATT, COLON BROWN, J. P. NICELY, WILLIAM H. HUNT, CLAUDE E. HARPER, ROBERT A. COSTA, WILLIAM D. HERBERT, GEORGE J. PECARO, JAMES D. MORAN

UNITED STATES GYPSUM COMPANY,
APPELLANT IN NO. 75-1836

NATIONAL GYPSUM COMPANY,
APPELLANT IN NO. 75-1837

GEORGIA-PACIFIC CORPORATION,
APPELLANT IN NO. 75-1838

THE CELOTEX CORPORATION,
APPELLANT IN NO. 75-1839

COLON BROWN,
APPELLANT IN NO. 75-1840

J. P. NICELY,
APPELLANT IN NO. 75-1841

ANDREW J. WATT,
APPELLANT IN NO. 75-1842

(D.C. Criminal No. 73-347)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, HUNTER and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court filed July 15, 1975, be, and the same are hereby reversed and the cause remanded in accordance with the opinion of this Court.

ATTEST:

/s/ Thomas F. Quinn
Clerk

January 6, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1836/42

UNITED STATES OF AMERICA, APPELLEE,

v.

UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, GEORGIA-PACIFIC CORPORATION, KAISER GYPSUM COMPANY, INC., THE CELOTEX CORPORATION, THE FLINTKOTE COMPANY, GRAHAM J. MORGAN, ANDREW J. WATT, COLON BROWN, J. P. NICELY, WILLIAM H. HUNT, CLAUDE E. HARPER, ROBERT A. COSTA, WILLIAM D. HERBERT, GEORGE J. PECARO, JAMES D. MORAN

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by UNITED STATES OF AMERICA in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the cir-

cuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ James Hunter, III
JAMES HUNTER, III
Judge

Dated: March 10, 1977

APPENDIX D

UNITED STATES DISTRICT COURT
W. D. PENNSYLVANIA

Crim. No. 73-347

UNITED STATES OF AMERICA

v.

UNITED STATES GYPSUM COMPANY ET AL.

Oct. 21, 1974

OPINION

TEITELBAUM, District Judge.

From September 9, to September 13, 1974, an evidentiary hearing in the above-captioned criminal antitrust case was held before this Court. The evidentiary hearing was held at defendants' request in order to enable them to attempt to prove substantial and intentional [1] pre-accusation delay on the part of the

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[1] Defendants urge this Court to find that a finding of actual prejudice to defendants is sufficient to warrant dismissal regardless of whether the prejudice was the result of intentional delay. Neither case cited in support of the point, however, [United States v. Parrott, 248 F.Supp. 196, 208 (D.D.C. 1965) and United States v. Harmon, (D.C.J., 379 F.Supp. 1349, August 7, 1974] stands for that proposition and this Court will not so hold. The *Parrott* case examines not the *Marion* doctrine with which we are concerned here, but the doctrine of delay as a result of choice of venue contained in Petition of Provoo, 17 F.R.D. 183 (D.Md.), aff'd, 350 U.S.

Government in support of their motion to dismiss the indictment brought against them. Having examined the evidence that they have brought forth in support of their position and having considered their legal arguments, I have concluded that defendants' motion to dismiss must be denied.

The wellspring of defendants' position is the following quotation from United States v. Marion, a recent United States Supreme Court case:

> "[T]he Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." United States v. Marion, 404 U.S. 307, 324, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971).

In considering the import of this quotation, it must be borne in mind: 1) that in the *Marion* case this position was conceded by the Government in its brief

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857, 76 S.Ct. 191, 100 L.Ed. 761 (1955). The *Provoo* doctrine was discussed in a previous opinion in this case, United States v. U. S. Gypsum, et al., 383 F.Supp. 462 (W.D.Pa. 1974). Judge Weber held in the *Harmon* case, not that a showing of intentional delay was not necessary but that: "In the lack of any reason advanced by the government for the delay, we may infer that there was an intent by the government to secure a tactical advantage over the defendant. Such an intent can rarely be shown otherwise." (p. 1351 of 379 F. Supp.). In this case, the reasons for the Government's alleged delay in bringing the indictment are fully justified as is substantiated *infra*.

and 2) that neither intentional delay nor actual prejudice to the conduct of the defense were proven in that case. Prejudice was not even alleged. Moreover, Justice White, speaking for the majority in *Marion*, went on to point out, immediately following the statement quoted above:

> "However, we need not and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays require the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution." *Id.* at 324, 92 S.Ct. at 465 (footnotes omitted)

The Court has indulged defendants in their request to hold an evidentiary hearing on the question of pre-indictment delay here because this is an important case, one with potentially grave consequences for the liberty of ten men and the legal and financial status of six large corporations, and because this Court recognizes its inherent power, springing from its Constitutional mandate to insure fairness and see that justice is done in criminal matters, to dismiss this indictment, or any other, if it were convinced that defendants' fundamental due process rights had been abrogated. But this does not mean that this Court harbors no doubt as to the viability of the legal theory under which defendants proceed or especially that this Court has a mind to setting a precedent of

investigating the Government investigators in every criminal case which comes before it. I point this out because I want no misunderstanding of my motives nor any misunderstanding of what I consider to be the decidedly limited precedential value of my approach in this case. Defendants' goal in the hearing was to prove both 1) intentional delay on the part of the Government, inspired by the hope of gaining improper tactical advantage over the defendants, which 2) has worked to the actual prejudice of the conduct of the defense.[2] They have failed to demonstrate either proposition.

THE ISSUE OF INTENTIONAL DELAY

In order to provide a background for the discussion which will follow, it is necessary to provide a synopsis of the major events which preceded the return of the indictment in this case. In 1923, as a result of much litigation and negotiation between the parties, the major gypsum wallboard producing corporations in this country became signatories, along

[2] In their brief, defendants contend that a showing of *either* actual prejudice *or* intentional delay will suffice to cause the indictment to be dismissed. Such a view is ill-founded. The two concepts are inextricably bound in the *Marion* scheme, each serving as the necessary counterpart of the other. The point hardly requires demonstration, especially since the cases cited by defendants to support their dualistic view [United States v. Erickson, 472 F.2d 505 (9th Cir. 1973); United States v. Stein, 456 F.2d 844 (2d Cir. 1971); United States v. Ianelli, 461 F.2d 483 (2d Cir. 1972)] simply do not require, or even recommend, an either/or approach to this problem.

with the United States, to a consent decree on the issue of price controls within the industry. In 1928, an amendment to the 1923 consent decree was contractually agreed to by the parties and in 1951 yet another consent decree was signed.

In March of 1961, Claude Huckleberry, president of the Texas Gypsum Co., met at the behest of his Congressman with the then Attorney General of the United States, Robert Kennedy, to complain that his company had been the target of allegedly predatory price fixing practices by the major gypsum producing corporations, members of the Gypsum Association.[3] Huckleberry's apparent intention in this meeting was to seek an investigation by the Antitrust Division of the majors' activities. Huckleberry was subsequently informed that his complaint had been referred to the Attorney General of the State of Texas for possible action under that state's antitrust laws.

In March of 1962, Texas Gypsum filed a private treble damage action against each of the companies who are defendants in this case (except Georgia-Pacific), and the American Gypsum Company, in addition. Discovery by means of deposition and interrogatories took place, but in April of 1965 the

[3] Each of the corporate defendants in this case, except Georgia Pacific, was a member of the Gypsum Association at that time. Georgia Pacific became a member of the Association in early 1965 subsequent to its acquisition of the Bestwall-Gypsum Co., at the time a leading producer of gypsum wallboard products.

case was settled out of court, soon after the Texas Gypsum Company was acquired by another concern.

In the meantime, in August of 1964, Huckleberry had complained to the Federal Trade Commission (FTC) about alleged price fixing in the gypsum industry and had supplied that agency with documents from the Texas Gypsum case as support for his charges. In October of 1964, Huckleberry's complaints were referred to the Antitrust Division.

From late 1964 until the fall of 1966, as revealed by internal Government memoranda, the focus of FTC and Justice Department personnel was upon 1) the promulgation of trade practice rules for the gypsum industry and 2) the possibility of action against the Texas Gypsum defendants for violation of the judgments entered against them some years earlier in the District of Columbia and the Southern District of New York. No fair analysis of the Government's activity could conclude that anything like a full-scale investigation of the gypsum industry with an eye to possible criminal indictments was taking place during this period.

On March 23, 1966, Pensinger Builders Supply Co. v. Kaiser Gypsum Co., C.A. No. 5923-PHX, (D. Ariz.) was filed in Federal District Court in Phoenix, Arizona. *Pensinger* was the first drop in what was to become a torrent of private treble damage actions alleging *inter alia*, price fixing against the major gypsum producers. The *Pensinger* case was later settled out of court. On January 25, 1967, Wall

Products Co. v. National Gypsum Co., 326 F.Supp. 295 (N.D. Cal. 1971); 357 F.Supp. 832 (N.D. Cal. 1973), a private treble damage, action was filed in the Northern District of California. This was the first of 143 cases against the gypsum corporations which were ultimately filed in San Francisco or transferred there by the Panel on Multidistrict Litigation and assigned to District Judge Alfonso Zirpoli. The *Wall Products* litigation, having begun in January of 1967, was not ultimately concluded until midsummer of 1974 when the final order on attorney's fees was entered.

On October 25, 1966, Baddia Rashid, Deputy Director of Operations of the Antitrust Division wrote to Alan Dobey, then Chief of the Antitrust Division's Trial Section, to authorize a "full investigation of the gypsum industry" by the Division's Central Office in Washington, with the pending investigations then ongoing in the Chicago and Philadelphia offices to be consolidated. This "full investigation" was, of course, mammoth in its scope and, as a consequence, quite time-consuming. It is clear that the very nature of the investigation—with its hundreds of people to be questioned, its mountains of documents to be examined and analyzed and its inherent difficulties of orchestration—led inevitably to a four-year delay before the Assistant Attorney General was in a position to make a decision as to whether a grand jury should be empaneled. As an example, it is apparent that the investigation floundered for many months

while Justice Department investigators decided whether and whether it was possible to pursue a "shared monopoly" theory against the companies as opposed to a strict conspiracy theory.[4] In general, it is clear that the inherently cumbersome nature of the investigation serves to explain whatever delay occurred at this initial stage. Little else is even suggested by defendants.

On December 23, 1969, Robert B. Hummel, Rashid's successor as Deputy Director of Operations, made his report to the office of the then Assistant Attorney General, Richard McLaren. Hummel's report was the culmination of the appraisals and recommendations of the Central and San Francisco office investigations, wherein the pros and cons of grand jury action had been candidly weighed and debated. Hummel urged that a grand jury not be empaneled for two reasons: 1) an indictment was not warranted in *Container* type cases "particularly so close upon the Supreme Court decision,"[5] and 2) the public in-

[4] Although its primary importance lies in the fact that it turned out to be nothing more than a time-consuming dead end, the fruitless pursuit of a "shared monopoly" case against the gypsum companies is also significant because it is susceptible to the interpretation that the investigation's purpose was to develop evidence for a civil action, not a criminal conspiracy case. Thus, if that inference were carried to its logical conclusion, it could be said that there was no investigation, in the sense that defendants complain of one, until at least 1970.

[5] The reference is to United States v. Container Corp of America, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969), handed down in January of 1969. In *Container* the reciprocal

terest was being adequately represented in the private treble damage actions.[6] McLaren personally

exchange of price information between competitors as to specific sales to identified customers was held to constitute illegal price fixing, regardless of the intent of the competitors. In the *Wall Products* case, *supra*, Judge Zirpoli held that Cement Manufacturers' Protective Association v. United States, 268 U.S. 588, 45 S.Ct. 586, 69 L.Ed. 1104 (1925), constituted an exception to the *Container* doctrine and that good faith adherence to the Robinson-Patman Act, as well as the "lying buyer" defense of *Cement Manufacturers*, was sufficient to render *Container Corporation* inapplicable. Defendants contend that the Government stalled awaiting a decision in *Wall Products* and then, once a decision had been handed down, sought an indictment in a District other than the Northern District of California in order to avoid the effect of Judge Zirpoli's reading of *Container*. As is fully substantiated in the text, the first contention is entirely without basis in fact. The second contention ignores the fact that the *Container/Wall Products* dichotomy (what has been called the verification issue in this case) raises profound policy questions which go to the very heart of trade regulation in this country. At this stage of the proceedings, I will not demean the conduct of the Government attorneys in this case nor oversimplify the import of this complex, portentious issue by holding that the Government was motivated in any decision leading up to the indictment by so base an instinct as the evasion of one judge or one judicial district. Their motivations, as amply demonstrated in the internal Government memoranda available to defendants, were far more complex and honorable.

[6] Defendants raise the novel argument that this prosecution is barred by collateral estoppel, *res judicata* and double jeopardy, ignoring the facts that 1) the *Wall Products* case and this case arise in different factual and legal contexts; while the cases are *similar*, they are in no sense the *same* as to either their facts or as to issues raised, and 2) that the Government was not a party to the *Wall Products* litigation,

noted Hummel's memorandum "O.K. to close 1/14/70."

Six months later, however, in July of 1970, the FTC began its own investigation of gypsum pricing policies. Spurred on by developments brought to light by the FTC, Justice reopened its investigation in October of 1970. Attached to the memorandum ordering reopening is a buckslip from Hummel to the Assistant Chief of the Antitrust Division Judgment Section stating: "Suggest you wait for decision of Judge Zirpoli in west coast case before framing any charges." Defendants point to this statement as evidence of the Government's alleged policy of obfuscation and delay, calculated to prejudice the defendants. I do not find it to be such; indeed, I would be surprised, given the enormity of the potential implications of the west coast decision, had the Government pursued any other course. To have done so would have been, however, merely impetuous. The important point is that there is no evidence to sug-

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and 3) that the Sherman and Clayton Acts encourage *both* Government and private enforcement litigation. While it may be uncommon for criminal antitrust prosecution to follow, rather than precede, private treble damage litigation, there is no legal foundation under these circumstances for the proposition that such a sequence is impermissible. Moreover, express reliance on private attorneys generally has the salutary effect of multiplying the effectiveness of Justice Department personnel during a period when antitrust enforcement presents problems of great complexity and scope. See the remarks of Assistant Attorney General Richard McLaren before the Federal and Philadelphia Bar Associations, December 11, 1969 at p. 2.

gest that the Government's delay was based upon anything other than the sound and circumspect policy reasoning which is incumbent upon Justice Department officials in the performance of their duties.

Judge Zirpoli rendered his *Wall Products* liability decision (326 F.Supp. 295) on March 18, 1971. After digesting and analyzing that opinion, John C. Fricano recommended to his superiors in the Antitrust Division on July 12, 1971 that a grand jury be empaneled to undertake a full Sherman Act Investigation of the Gypsum industry. Attorney General Mitchell approved the request in August of 1971 and a grand jury was empaneled in Pittsburgh within that month.[7]

On December 11, 1973, Rashid wrote a memorandum to Thomas Kauper, head of the Antitrust Division, recommending approval of a proposed indictment against the gypsum defendants. On December

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[7] Defendants suggest that some impropriety and resultant prejudice can be found in the fact that the grand jury was empaneled in Pittsburgh, rather than in San Francisco, where the *Wall Products* litigation was taking place. Notwithstanding the fact that this Court's June 18, 1974 Opinion on defendants' motion to sever and transfer was thought to have disposed of all venue questions in this litigation. I find no impropriety or evidence of international delay in the Justice Deparment's decision. As explained by Marquis Smith, head of the Division's San Francisco Office, in his testimony before this Court, only one day per week of grand jury time was available in the Northern District of California for Justice Department use. The convening of a grand jury in Pittsburgh would thus appear to have been a time-saving rather than a time-wasting measure.

20, Kauper in turn recommended approval of the indictment to Acting Attorney General Bork. On December 27, 1973, the indictment herein was filed.

Defendants are unable to point to even a single isolated example of what they claim to be an over-all pattern of undue delay on the part of the Government which took place during the time the grand jury was in session. This is so even though it took almost two and one-half years, from August of 1971 until December of 1973 for the grand jury to return an indictment. To my mind, this amounts to tacit recognition of the fact that little else could be expected, given the titanic scope of the Government's undertaking. A mere glance at the mountains of documentary evidence *already* filed in this case should be enough to convince even the most skeptical of observers that a great deal of time was necessary to get this case through the grand jury process. Moreover, the point that the explanation for the length of time it has taken to obtain an indictment lies primarily in the mammoth dimensions of this case, and nowhere else, is valid when applied to the entire period under review here, not just the period when the grand jury was in session. The defendants in this case have introduced no evidence and have elicited no testimony sufficient to even raise the inference, let alone clearly demonstrate, that the Government, at any time from 1961 through 1973, ever even entertained the notion of engaging in deliberate procrastination for the purpose of obtaining improper tactical advantage over the defendants.

Faced with this fundamental obstacle to the achievement of their goal, the defendants have resorted to quoting out of context from various of the internal Government memoranda in their possession, as if to say that this indictment should be dismissed because it is less than ironclad. For instance, they quote from the previously mentioned December 11, 1973 memorandum from Rashid to Kauper, the following language:

> "With respect to most of the [proposed individual defendants], the evidence falls short of identifying specific affirmative acts in furtherance of the conspiracy within the five-year statutory period."

At this point, it should be noted that the defendants have had, as the Court has had, access to extremely candid analyses of Justice Department policy-making, written during the period in question; the above-quoted material is an example. In anticipation of the evidentiary hearing, defendants subpoenaed all internal Governmental memoranda dealing with the gypsum defendants during the 1961-1973 period. This large quantity of material, the largest portion of which consists of interdepartmental communications written by Justice Department personnel to their superiors with the exception of complete confidentiality, was examined in detail by the Court *in camera* during the course of the hearing. Defendants were then informed that, despite the prosecution's strenuous objections to my doing so, the material would be turned over to them for their examination.

My ruling was not intended to establish a precedent for the future, but was made because of the unique nature of the proffered defense in this case. The defendants had contended that delay in bringing an indictment or, indeed in empanelling a grand jury, had been an intentional tactical device by the Government here. Recognizing that proof of this could be found only in the Government's files, if, indeed, it existed at all, I made my ruling so as to grant defendants access to all material which might have any bearing on the point they wished to prove. Even though my *in camera* examination indicated that the documents did not help the defense and, in fact, served to demonstrate the opposite conclusion from that which they hoped to prove, I decided to make the documents available so that defense counsel could decide as to utility of the material. I did this reluctantly because I realize that within the Government, superiors should be able to expect frank and full comment by their subordinates in matters such as this and because making such documents available to defense counsel in this case might have a chilling effect on such full disclosure and openness in comment in the future. As I have indicated, I believe that because the empanelling of a grand jury or the return of an indictment entail drastic consequences for the persons investigated or indicted, such measures should be taken only after full consideration of all factors involved. Hopefully, the release of these documents to defense counsel will not result in any relucance on the part of Governmental staff personnel

to fully and forthrightly set forth their views when such matters are under consideration.

Nevertheless, after balancing all the factors in this case, it seemed to me that the fair thing to do was to allow the defense to examine documents to see if there was, in fact, matter contained therein that would be useful in their argument. On balance, and with recent precedent for my thinking, I reasoned that the Government's claim of privilege and confidentiality must give way to the rights of defendants in criminal proceedings. See United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

By making this material available, I certainly did not mean to permit arguments at this stage on the ultimate strength or weakness of the Government's case. By the same token, neither do I intend to imply that views expressed by Government staff members on such issues will be admissible at the trial of the merits. The ultimate strength or weakness of the Government's case will be determined at the appropriate stage of the proceedings.

Throughout this mass of internal Government memoranda, which serves to reveal in intimate detail the process leading to the return of the indictment against these defendants, there is only one explicit reference to a policy of delay. This is found on a buckslip attached to a letter dated May 28, 1965, routed between FTC personnel. The buckslip states as follows:

> "The gypsum companies are serious about wanting the proposed rules issued and have been

> needling me from time to time to get on with the project. This letter is one of those needles. Since I have no 'progress' to report to the industry, I suggest that this letter be answered by my successor to the project *who can start all over again with the delaying tactic that he hasn't studied the matter, etc.*"

Because the slip evidences FTC, not Justice Department, thinking, in 1965, well before a full gypsum investigation had begun, and is in specific reference to the promulgation of FTC trade practice rules and nothing else, I feel its probative effect as to the question before this Court is almost nil.

Thus, upon a thorough view of the evidence and testimony, I have concluded that there is nothing to support a conclusion that the Government has engaged, intentionally or otherwise, in anything like a conscious policy of delay designed to adversely affect defendants' rights. To the contrary, I have concluded that, given the inherent difficulties involved in orchestrating and assembling a nationwide investigation of the pricing policies of an entire industry, the Government has proceeded throughout with all due deliberate speed.

THE ISSUE OF PREJUDICE

Because I have determined that there is no evidence of unreasonable delay on the part of the Government, there is little need to devote a great deal of attention to defendants' corollary contention that they have suffered substantial prejudice as a result of the

Government's unproven delay. Defendants argue that they have been severely prejudiced by the death, retirement or dimmed memories of many potential witnesses. They list 33 persons who have had some connection with the gypsum industry who have died in the ten years since 1964. They also list 75 individuals who have retired, resigned or otherwise ended their association with the gypsum industry in the years since 1962. As to this latter group, defendants contend that they are prejudiced because the passage of the years has so irrevocably dimmed this group's collective memory as to render them incapable of accurate testimony concerning events called in question by means of this indictment.

I do not find that defendants have been prejudiced to any extraordinary degree whatsoever by the chain of events leading to this indictment. Several potential witnesses may have died, but enough remain alive to insure what this Court is told will be a six-month trial. Memories may have been dimmed by the passage of time but, as defendants are will aware, the Government as well as themselves will have to contend with this commonplace difficulty. Moreover, and most importantly, a finding of prejudice to the defendants would have significance only if it had been determined that the Government had intentionally engaged in a pattern of tactically-motivated delay. Absent a finding of intentional delay, the question of prejudice is all but moot.

CONTENTION OF U.S. GYPSUM

Defendant United States Gypsum supplements the motion to dismiss filed on behalf of all defendants by complaining that it is concurrently defending four different proceedings in four different jurisdictions, each arising out of a single course of action. These are: 1) this indictment, 2) the Government's civil damage action in the Northern District of California, 3) the Government's criminal contempt petition in the District of Columbia, and 4) a Federal income tax deficiency proceeding to disallow several million dollars in price adjustments which arose out of the price fixing adjudicated in the *Wall Products* case. The simple answer to U.S. Gypsum's complaint that the Government is throwing the book at it is that this Court has jurisdiction only over the indictment filed in this case and is powerless to affect their predicament elsewhere. But even if that were not so, the arguments advanced by U.S. Gypsum, based upon ill-conceived notions of collateral estoppel and *res judicata*, demonstrate only that the sequence of events under consideration is uncommon. This Court is simply not convinced that this pattern of what U.S. Gypsum labels "harassment" is constitutionally or otherwise legally impermissible.

U.S. Gypsum also attacks the tax deficiency proceedings against it with the convoluted argument that since the Internal Revenue Service (IRS) disclosed certain information gained in its investigation of U.S. Gypsum to Justice Department officials without technical compliance with the authorization requirements of 26 U.S.C. § 6103, this indictment must be dismissed under the fruit of the poisonous tree doctrine. The argument fails for two reasons. First, insofar as U.S. Gypsum's attack upon the tax deficiency proceedings themselves, their argument, while it may be appropriate in another Federal forum, is inapproriate in this one. Second, and most importantly, U.S. Gypsum's whole elaborate syllogism must fail because there was no illegal disclosure by IRS officials to the Justice Department. All internal Government memoranda pertaining to this matter were subpoenaed by U.S. Gypsum and subsequently examined by the Court *in camera* and those deemed appropriate were made available to defendants. These documents, and the testimony of the witnesses called at the evidentiary hearing, reveal that while there have been meetings and consultations between various Internal Revenue Service and Justice Department personnel in regard to investigation of and possible action against U.S. Gypsum, there has been no disclosure, authorized or unauthorized, from the Internal Revenue Service to the Justice Department or *vice versa*, which was in contravention of IRC § 6103 and its supporting regulations or any other Federal law. Defendant U.S. Gypsum's argument is without merit.

CONCLUSION

Defendants' approach can be accurately described as an elaborate effort to sidestep the effect of the

statute of limitations in this case. The *Marion* opinion, defendants' starting point in their argument prefaces its discussion with a statement that the applicable statute of limitations (in this case five years per 18 U.S.C. § 3282) remains the "primary guarantee" against the bringing of state claims, (*Marion*, *supra*, 404 U.S. at 322, 92 S.Ct. 455). Any court considering the question of prejudical preaccusation delay is always left with the ultimate question—were there acts committed within the statutory period or were there not? From a defendant's point of view, the utility of the *Marion* doctrine is thus limited by the existence of this often unarticulated but ever-present question. Here, defendants have failed to show themselves to fall within *Marion*'s bounds. For that reason their motion will be denied.

APPENDIX E

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

Honorable Donald I. Baker
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D.C. 20530

Re: United States v. United States Gypsum Co., C.A. 3, Nos. 75-1836 - 75-1842

Dear Mr. Baker:

This is in response to your letter of April 4, 1977, requesting the Commission's views on certain questions in connection with your decision whether to seek certiorari in this case.

As we understand the facts, the indictment charged and the proof showed that the defendant producers of gypsum wallboard engaged in the practice of exchanging information about prices (*e.g.*, discounts off list) to specific customers. The evidence was in dispute as to the purpose and extent of such calls. The defendants claimed that the calls were intended solely to verify asserted competitive offers, described orally by sometimes unreliable customers, in order to satisfy the requirements for a "meeting competition" defense under Section 2(b) of the Robinson-Patman Act; that the discussions did not go fur-

ther; and that such price verification ceased before 1969. The Department, however, claimed that the Robinson-Patman Act imposed no such obligation to verify by checking with the competitor assertedly offering a lower price and does not sanction such means of verification; that that was not the purpose or scope of all or most such communications; and that they continued until 1973, when the indictment was returned.

The district court charged the jury that if the information was exchanged merely in a good-faith effort to comply with the Robinson-Patman Act then such verification, standing alone, could not be considered as establishing the charged agreement to maintain prices, but that they could consider the exchanges as evidence of the alleged agreement if their effect was to raise, fix, maintain, or stabilize prices.

The jury returned guilty verdicts, and the Third Circuit reversed the convictions and remanded for a new trial. The court held that the district court's instruction to the jury was improper because, in the court of appeals' view, the alleged desire to establish a Section 2(b) defense would create a " 'controlling circumstance' " [1] which "would legitimate an agreement otherwise prohibited by section 1 of the Sherman Act." Slip op. 15. Accordingly, the court of appeals ruled that the jury should have been in-

[1] Quoting *United States* v. *Container Corp. of America*, 393 U.S. 333, 335 (1969).

structed that the defendants' verification practices were not unlawful if the jury found that:

> (1) the [defendants] engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue [slip op. 22].

You have asked for the Commission's views on:

> 1) whether Section 2(b) requires the verification in which the defendants engaged;
>
> 2) whether, if it does not require the practice, intended compliance with Section 2(b) nonetheless should provide a defense to a violation of Section 1 of the Sherman Act through a price exchange agreement which stabilizes prices;
>
> 3) whether [the Department's] position would create problems for the Commission in enforcing the Robinson-Patman Act.

As to the first question, the Commission has never held or suggested that in order to establish a meeting-competition defense under Section 2(b) a seller must communicate with his competitors to verify their offers, whether it be on an isolated basis or as a systematic practice. Nor has the Commission ever indicated that such communications would be lawful if that was their true or ostensible purpose.

Commission decisions have required that a seller relying on Section 2(b) do more in certain circumstances than to rely upon conclusory oral statements by buyers whose credibility was open to question. *E.g.*, *A.E. Staley Mfg. Co.*, IV FTC Stats. & Decs. 795, 803-08 (1943), *rev'd*, 144 F.2d 221 (7th Cir.), *rev'd*, 324 U.S. 746, 758-60 (1945); *Forster Mfg. Co.*, 68 F.T.C. 191, 204-05 (1965), *aff'd*, 361 F.2d 340 (1st Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); *Surprise Brassiere Co.*, 71 F.T.C. 868, 960-63 (1967), *aff'd*, 406 F.2d 711 (5th Cir. 1969); *Viviano Macaroni Co.*, 73 F.T.C. 313, 345-49, 351-53 (1968), *aff'd*, 411 F.2d 255, 259-60 (3d Cir. 1969). See also *Cabin Crafts, Inc.*, 64 F.T.C. 799, 804-07 (1964), *rev'd sub nom. Callaway Mills Co.* v. *FTC*, 362 F.2d 435, 443-44 (5th Cir. 1966). However, in such cases the Commission has not suggested that direct verification from a competitor would be necessary or proper. Nor has the Commission suggested that such communications would be proper in the limited circumstances specified by the court of appeals.

Proper methods of verification that might be feasible in a particular case will depend in part upon the circumstances, so that it is not possible or appropriate to provide a definitive listing of such methods in the abstract.

We do not believe that the fact that a price verification agreement was intended to comply with Section 2(b) should provide a defense to a Sherman Act

charge. Even if taken at face value, such assertions of intention based on a misapprehension of the law would normally have a bearing only on the question of willfulness, but specific intent is not required to make violation of the Sherman Act a crime,[2] and is of course irrelevant to the question of a civil violation.

Beyond this, to permit an avowed intention to comply with the requirements of Section 2(b) of the Robinson-Patman Act to excuse what would otherwise be a violation of the Sherman Act could result in price maintenance. Recognition of such a defense would sanction a type of communication between competitors which is inherently difficult to police and keep within proper bounds, and could provide the occasion for improper collaboration of competitors.

Finally, the Commission does not believe that the position espoused by the Department—which is consistent with the Commission's own position—would create problems for the Commission in enforcing the Robinson-Patman Act. Since the Commission has never endorsed direct verification from competitors as a means of establishing a meeting-competition defense under Section 2(b), the principal consequence of the Department's position would be merely that a theoretically possible means of verifying competitive offers (to establish good faith) is not available.

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[2] See, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 210-28 (1940).

The Commission recommends that the Department seek certiorari to obtain clarification of the law in this important area.

By direction of the Commission.

/s/ John F. Dugan
JOHN F. DUGAN
Acting Secretary

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